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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 78-1759

JOAN E. HELM, individually and as Guardian ad Litem for DAVID WILLIAM QUEDENS, an Incapacitated Person,
Petitioner,

vs.

PACIFIC POWER AND LIGHT CO., a Maine corporation, MOBILE AERIAL TOWERS, INC., an Indiana corporation and THE IDAHO FIRST NATIONAL BANK, a National Association,
Defendants.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

JOAN E. HELM, individually and as Guardian ad Litem for DAVID WILLIAM QUEDENS, an incapacitated person, the petitioner herein, prays that a Writ of Certiorari issue to review the MEMORANDUM filed in the United States Court of Appeals for the Ninth Circuit on November 30, 1978 and the ORDER DENYING REHEARING by the same court filed herein on February 26, 1979.

OPINIONS BELOW

The opinion or MEMORANDUM of the United States Court of Appeals of the Ninth Circuit is attached hereto and marked Appendix "A". The MEMORANDUM DECISION AND ORDER and JUDGMENT OF DISMISSAL entered on motions for summary judgment are attached hereto and marked Appendices "B" and "C", respectively.

JURISDICTION

The Memorandum and Judgment of the United States Court of Appeals for the Ninth Circuit, Appendix "A" herein, was entered on November 30, 1978. A timely petition for rehearing was denied on February 26, 1979. The ORDER DENYING REHEARING BEFORE THE PANEL is attached hereto and marked Appendix "D". The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

I. Was DAVID WILLIAM QUEDENS denied his constitutional right to a jury trial by the trial court granting summary judgments in favor of defendants herein thereby preventing jury consideration of the following questions:

1. Is there a duty upon a power company to take affirmative action to protect persons who foreseeably might be injured by coming into contact with uninsulated high voltage wires?

2. Is a manufacturer responsible for the consequence of accidents due to its failure to utilize known safety devices, regardless of whether the danger is latent or patent?

3. Is an employer responsible for personal injuries suffered by an employee of an independent contractor where the work was done under hazardous conditions known to such employer, and there were special risks of harm or injury involved in the activity in question?

II. Was there jurisdiction over defendant MOBILE AERIAL TOWERS, INC., an Indiana corporation, who placed its product into the stream of commerce knowing that it would be used in the State of Idaho?

III. Did the trial court violate the familiar rules of law applicable to motions for summary judgment in failing to draw all inferences and decide all doubts in favor of plaintiff?

STATUTE INVOLVED

Idaho Code, § 5-514.

STATEMENT OF CASE

Federal jurisdiction is based on diversity of citizenship, the plaintiff being a citizen of the State of Idaho, defendant PACIFIC POWER & LIGHT COMPANY being a Maine corporation, defendant MOBILE AERIAL TOWERS, INC., being an Indiana corporation, and defendant IDAHO FIRST NATIONAL BANK being an Idaho corporation. The accident depriving 23 year old DAVID WILLIAM QUEDENS of both of his hands and his mental capacity occurred at Sandpoint, Idaho on July 13, 1973. (C. 120-121, 131.) DAVID'S mother, plaintiff JOAN E. HELM, was appointed Guardian ad Litem because of his incapacity prior to filing the Complaint. (C. 4.)

DAVID was born in San Francisco, California in 1951. He served in the United States Navy from 1971 to 1973. (C. 104.) After his discharge from the Navy, he lived in Boise, Idaho. In March of 1973, he went to work for Davey Tree Company as a tree trimmer in Boise, having worked for them before for five months in 1971. (C. 96.) He has not worked since July 13, 1973, the date of his tragic accident and will be unable to do so for the rest of his life. His only marriage was terminated by a divorce and he has one child. (C. 95.)

On June 26, 1973, defendant IDAHO FIRST NATIONAL BANK at Sandpoint, Idaho, contracted with DAVID'S employer, Davey Tree Company to remove fourteen trees and prune twenty-nine others on a site being prepared for a new bank building. At such time the bank *was aware* of the existence of the high voltage lines traversing diagonally across Second Street in Sandpoint in the middle of the block. (C. 399.) One end of these wires was attached to the main line running parallel to the sidewalk in the vicinity of some of the trees which were to be trimmed. (C. 431:14, 19 and 22; 432.) The bank did not call the existence of these power lines which were sufficient to electrocute a person to the attention of any representative of Davey Tree Company, nor to the attention of DAVID and his assistant, Alex Sharpe, even though they had been working in this area for two weeks prior to the accident. (C. 401:12.) In fact, the bank took no affirmative steps to prevent the accident, such as requesting a shut-off of the current during the time that the work was taking place near these uninsulated high voltage wires which as aforesaid went across the street in the middle of the block. (C. 403:12.)

The uninsulated high voltage lines were owned, operated and maintained by defendant, PACIFIC POWER & LIGHT COMPANY. The wires were "No. 6" gauge, a small wire virtually invisible particularly when looking into the sunlight as DAVID was at the time of his accident. No warning such as posting on the power poles was given by PACIFIC POWER to any person regarding the intrinsic danger of said wires or that they were uninsulated. (C. 422:25, 430:29, 437:19, 440:10, 431, 432). Within one or two days prior to DAVID'S accident, PACIFIC POWER had *actually become aware* of the tree trimming operation, the work having been observed by PACIFIC POWER'S District Superintendent. No affirmative steps of any kind were taken by PACIFIC POWER to avoid the forseeable type of accident which occurred. (C. 458:25, 459-12.)

In doing their work, DAVID and SHARPE used a truck on which a boom was mounted carrying a bucket (sometimes referred to as a "cherrypicker") measuring 3′ by 1½′, being 3½′ deep. (SHARPE DEPO. 28:22.) The tools for the trimming job itself were a hydraulic pruner and a hydraulic saw. The person standing in the bucket would be visible from the bottom of his rib cage upwards. In its lowest position, the bucket was 12′ above the ground and could be easily raised to the height of the wires approximately 35′ above the ground. The boom can be operated by the person in the bucket and also by emergency equipment attached to the truck. (SHARPE DEPO. 27:6; 29:1; 31:15; BOYLE DEPO. 82:3, 11:8.)

Just prior to the accident, at about 4:30 p.m., DAVID was in the bucket approximately 15′ to 20′ from the closest limb of a tree which he surveyed in order to determine the

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Just prior to the accident, at about 4:30 p.m., DAVID was in the bucket approximately 15′ to 20′ from the closest limb of a tree which he surveyed in order to determine the

details of the trimming. (SHARPE DEPO. 55:9.) He was facing in a southwesterly direction, *looking towards the sun.* (BOYLE DEPO. 75:13, 76:5.) DAVID raised the bucket, which was his usual custom in order to improve his looking at the tree, and while doing so, raised the bucket between two of the high voltage wires which were approximately three feet apart. (BOYLE DEPO. 15:23.) He then lowered his hands toward the rim of the bucket and, while doing so, touched one of the wires with each hand. (BOYLE DEPO. 78:8.) As a consequence, he was electrocuted resulting in a total loss of his brain power to a point where he is unable to recognize his mother. Both arms were amputated at the elbow level. His medical expenses have been in excess of $50,000.00. (C. 99.)

The only eye witness to the incident was BOYLE who had stopped approximately 200′ from the scene of the accident at the street corner north thereof, and in his deposition testified as follows (BOYLE DEPO. 9:7):

> "I could see that he was getting close to the wires and I was wondering if he could—if he had seen them and this is where I figured the first—when the bucket first hesitated the first time that he had spotted the wires and had stopped and was going to move away from them. And then when he moved on up, I could see that he was going into in between two of them. I was standing watching and when I seen him stop in under the wires, I watched him raise and I was wondering to myself if he had seen the wires." (BOYLE DEPO. 84.21, C. 785.)
>
> "Question by the investigator: "It looked that he perhaps wanted to grab the side of the bucket?"
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> "Answer: "It could be. He might have dropped his one hand to reach for the control."

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"Question by the investigator: "It looked that he perhaps wanted to grab the side of the bucket?"

"Answer: "It could be. He might have dropped his one hand to reach for the control."

BOYLE also testified it was possible he told one of the investigators that DAVID may not have seen the wires because of the sun's location. (BOYLE DEPO. 84:21.)

DAVID'S position was duplicated three years later on the date of the accident, that is, July 13, by Scott Beamer, an electrical engineer. This was done in order to evaluate the impairment of DAVID'S vision by the sun, which he was facing. Beamer states that from DAVID'S position it was impossible to see the wires with which he came in contact and pictures submitted in opposition to the motions for summary judgment confirmed this statement. (C. 700: 13, 761:13.)

MOBILE AERIAL TOWERS, INC., an Indiana corporation, manufactured, sold and delivered to Davey Tree Company in Idaho the machinery used by DAVID at the time of the accident. (C. 486 and 501.) This defendant was served out of state. The complaint alleged, and documents submitted in opposition to the motions for summary judgment proved, that at the time of the accident various safety devices were on the market which issued a warning beeping-type signal if the bucket were to come in the vicinity of high voltage wires. These are sometimes called proximity warning devices. (C. 500.) The bucket used by DAVID did not carry such safety warning devices. (C. 494.) The trial court incredulously found that under these allegations service out of state was not sufficient to confer jurisdiction on the United States District Court over MOBILE AERIAL TOWERS, INC. in the State of Idaho.

The defense introduced as part of the motion for summary judgment an affidavit by DAVID'S superior while

he was working for Davey Tree Company the first time in 1971. DAVID'S then foreman stated that he had instructed DAVID to stay at a safe distance from high voltage wires and of the danger resulting from touching the same. The affidavit also stated that declarant had visited the scene of the accident after the incident in question and had no explanation as to why DAVID should have been in his position at the time of his injuries. (C. 597.) The affidavit was obtained unilaterally and not by deposition. There was never any cross-examination of said gentleman.

Shortly before the accident, *DAVID told his assistant that the work day was almost over and that they would go down and do their laundry at a laundromat before returning to their motel room.* DAVID had befriended a young lady during the time of the work in Sandpoint and had dated her on several occasions. DAVID was not an abuser of alcohol, was not subject to depressions and was always competent and efficient in his work. (SHARPE DEPO. 117:66, 52:3, 53:1, 92:13, 60:14.)

Unbelievably, based on these facts, the trial court reached the conclusion on motion for summary judgment that DAVID was bent on an *act of self-destruction* and granted the defendants' summary judgment motions.

REASONS FOR GRANTING WRIT

Young DAVID QUEDENS at the time of the catastrophic accident in question was only 22 years old. As indicated, supra, he not only lost both of his hands, but also his mental capacity and accordingly at no time during these proceedings was able to speak for himself or give his ver-

sion of what really happened at the time and place of the accident. The court below instead of following the familiar rules applicable to motions for summary judgment which require all inferences and doubts to be resolved against the party moving for summary judgment, chose to pick out bits and pieces of evidence which it felt would support the motions of the defendants' in their theory of the case, thereby depriving DAVID of his constitutional right to a jury trial, and in particular to have the jury determine the issues of fact involved in this case. Because of the tragic nature of the injuries involved and the extreme seriousness of this case we ask this court as the court of last resort to seriously look at the points involved in order to over-turn the incredible and unbelievable miscarriage of justice that has taken place. We will briefly summarize the more important such points which are more fully set forth in our briefs filed below. Same are as follows:

I.

DAVID QUEDENS WAS DENIED HIS CONSTITUTIONAL RIGHT TO A JURY TRIAL BECAUSE THERE ARE MATERIAL ISSUES OF FACT AS TO EACH DEFENDANT.

1. The Liability of the Power Company—Electricity

A. It was an issue of fact for the jury to decide whether or not the power company took proper, affirmative action to protect appellant from its deadly uninsulated high voltage wires following the time that it had knowledge that plaintiff was working in the vicinity of said wires.

Electricity is recognized as one of the most deadly instrumentalities known to mankind. It is a silent, deadly killer,

likened to the dangers of a concealed cobra. And because thereof the courts in this land have uniformally held that the purveyor thereof is held to the highest possible care and that it must exercise the utmost care and prudence that is humanly possible under the circumstances to prevent injury, and that most importantly *when circumstances change*, as for example when men and equipment commence working in the area of said wires that it must immediately and forthwith take positive, affirmative action *to do whatever is necessary* to prevent injury and/or death from occurring, as for example to insulate the wires, to temporarily disconnect them, to temporarily raise them, to put colored markers on them, or to take whatever other steps are feasible to prevent injury. *This is known as the affirmative duty and/or action rule.*

One of the lead cases setting forth said doctrine is *Lozano v. Pacific Gas & Electric Co.*, 70 C.A.2d 415, 161 P.2d 74 (1945), which case involved two workers who were killed when a light tower they were pushing came in contact with an uninsulated high voltage wire which was 43 feet above the ground and which ran over the work area in question—a wire that was considerably higher than the ones in the instant case. The court in said case set forth the liability of the power company and its affirmative duties to take immediate action to prevent injury as follows:

> "The duty of due care with which the company was charged consists not only in the proper installation of the dangerous instrumentality but in the maintenance thereof in a safe condition *at all times and places and under the changing circumstances of the particular case*. Even if at the outset of the installation of the equipment the company may have been entirely free from fault, yet, *if, under changing circumstances,* a hazardous condition arose, *non-action* or the *failure to remedy such condition* would constitute culpable negligence." (*Lozano v. Pacific Gas & Electric Co., supra,* at p. 422.) (Emphasis added.)

The court in discussing some of the numerous things that the power company could have done to have prevented injury in said *Lozano* case with knowledge of the work going on in the area stated at page 422 as follows:

> "The record herein shows that there was ample evidence to permit the jury to conclude that the appellant company *could have prevented the accident either by insulating the wires, by placing them at a greater height above the ground, by running them in an underground conduit or by guarding them in some other fashion.* While the appellant was not under an absolute duty to insulate or make the wires safe in any *particular* manner *it was 'its duty to make the wires safe under all the exigencies offered by the surrounding circumstances.'* " (Emphasis added.)

There are literally dozens of other cases that we could cite which set forth this same humanitarian, elementary and just rule of law. Some of the many celebrated cases so ho' ing are:

Pope v. City of Los Angeles, 26 C.2d 515, 159 P.2d 931 (1945); *Dunn v. Pacific Gas & Electric Co.,* 43 C.2d 265, 272 P.2d 745 (1954); *McKenzie v. Pacific Gas & Electric Co.,* 200 C.A.2d 731 (1962); *Nevis v. Pacific Gas & Electric Co.,* 43 C.2d 626, 275 P.2d 761 (1954); *Black v. Public Service Electric & Gas Co.,* 265 A.2d 129 (1970); *Beck v. Monmouth Lumber Co.,* 137 N.J.L. 268, 59 A.2d 400 (1948); *Scott v.*

Pacific Power & Light Co., 35 P.2d 749 (1934); *Kingsport Utilities v. Brown*, 210 Tenn. 393, 299 S.W.2d 656 (1957), [This case is on all fours with the instant case and holds very clearly that at the very least it was a question of fact about which reasonable minds could differ as to whether or not the utility company was negligent in not having taken steps to make its wires safe when it knew construction work was taking place, and the court so held inspite of the fact that the minimum standards of the electrical code were met at the time of the accident and at the time the wires were installed]; *Chase v. Washington Water & Power Co.*, 111 P.2d 872 (1941) [Idaho case]; and, for a plethora of other cases see 69 A.L.R.2d p. 93 et seq.

The *Probart v. Idaho Power Co.* case, 258 P.2d 361 (1953), relied on by defendant power company is clearly distinguishable from the case at bar because in that case unlike in the present case the power company had no knowledge of the fact the construction equipment was working in the area in question. In the instant case it is uncontradicted that the power company had actual knowledge of precisely what type of men, equipment and machinery were working in the area and of the changed circumstances involved.

Applying these elementary rules to the instant case it could easily be argued that the power company is liable as a matter of law because it took absolutely *no steps* to protect young DAVID QUEDENS and his co-worker, Alex Sharpe from injury with *actual knowledge* that they were working in the immediate vicinity of the wires in question. At the very least or minimum as set forth in the above-mentioned Tennessee case of *Kingsport Utilities v. Brown*, it was a question of fact for the jury to decide whether or

not the power company should have de-energized the wires, raised them, put colored markers on the wires, or taken other safety precautions to prevent the accident in question. Failing to let the jury decide this issue deprived plaintiff of his constitutional right to a jury trial.

B. Power company's contention that it is exonerated from liability because it complied with bare minimum height requirements for the lines in question is preposterous.

It is elementary horn-book law not only with reference to the liability of power companies but with reference to virtually all types of defendants as for example manufacturers and others, that compliance with bare minimum safety requirements merely has the effect of preventing a charge of negligence per se, and that compliance constitutes only a floor and not a ceiling to the defendants responsibility. Same are merely some evidence of due care to be considered by the jury along with all of the other evidence. Such compliance does not remove the factual determinations of whether or not under the particular changing circumstances or circumstances of the case in question there was negligence. For some of the numerous cases so holding see *Miner v. Long Island Lighting Co.*, 353 N.E.2d 805 (1976); *Folden v. Robinson*, 364 P.2d 924 (Wash. 1961); *Nevis v. Pacific Gas & Electric Co.*, 275 P.2d 761 (Cal. 1954); *Merlo v. Public Service Co.*, 45 N.E.2d 665 (Ill. 1942); *Gladden v. Missouri Pub. Serv. Co.*, 277 S.W.2d 510 (Mo. 1965); *Chase v. Washington Water & Power Co.*, 111 P.2d 872 (Id. 1941).

C. It was a question of fact whether DAVID QUEDENS knew about the wires in question and/or whether or not there was anything about his conduct which would excuse the power company from having performed its duty.

The trial court and in turn the appellate court below chose to indulge in every inference that it could to find in favor of the defendant power company and the other defendants in the instant case. To put it bluntly they simply ignored the inferences and facts which would permit a jury to conclude to the opposite effect or to the contrary. We will point out just a few of the items of evidence in this regard which clearly show that it should have been an issue of fact for the jury as to what DAVID saw, what he knew, and what his intent or state of mind was at the time of his accident. Same are as follows:

1. The witness BOYLE wondered in one of his statements whether DAVID actually knew his bucket was between the wires. (C. 785.)

2. The same witness stated that while lowering his hands DAVID may have grabbed for the bucket. (C. 785.)

3. DAVID was continuously employed from 1970 to July of 1973, including military service with two years in the Navy. And at the time of the accident he was in excellent health. (C. 98.)

4. DAVID was not a user of either drugs or alcohol to any excess. (SHARPE DEPO. 117:16.)

5. DAVID was not a person who took chances and he was an excellent worker. (SHARPE DEPO. 92:13.)

6. Immediately before the accident DAVID had told his working partner Sharpe that as soon as they were finished working after he finished this last cut *that they would go home and do their laundry.* (SHARPE DEPO. 60:14.) [Such testimony if believed by the jury coming from the only man who talked to DAVID immediately before the accident, we believe would be most persuasive in convincing them that DAVID was not bent on an act of self-destruction or suicide as found by the trial court and affirmed by the appellate court. At least such testimony creates an issue of fact on that issue for the jury to decide.]

7. DAVID was following his usual and customary routine in positioning himself at a high position to overlook a tree before commencing to trim it. (SHARPE DEPO. 55:9.)

To put it bluntly while one could possibly arrive at the conclusion that DAVID intended to kill himself by torturing the evidence in the case as was done by the trial court, there was without any question ample evidence to the opposite effect from which a jury could conclude to the contrary and which we believe they would have done had we had an opportunity to fully present the evidence in the case and to argue the matter. The question of what DAVID knew, what he saw and what his intent or state of mind was at the time of the accident without any question were questions of fact for the jury to decide and were not for the court to determine on a motion for summary judgment where there was no right to confront the witnesses and examine them under the crucible of cross-examination and to present all of the evidence bearing on the issues.

Assuming, arguendo, that DAVID had knowledge of these specific wires at some time before the accident in question, and this isn't at all clear from the evidence in the case, it was nevertheless a question of fact for the jury to decide whether or not DAVID should be excused entirely because of such elementary principles such as absorption in his work, distraction, momentary forgetfulness, fatigue, or because he was blinded by the sun, or for any one of numerous other reasons that can be thought of. And further and in any event assuming that they found some fault on his part, it was for the jury to decide whether or not under the Idaho rule of comparative negligence there should only be a percentage reduction in his recovery rather than a total bar to recovery. It is elementary tort law in almost all states in this country at the present time, including Idaho that forgetfulness of a known danger is not contributory negligence as a matter of law. Such a barbaric rule has been abandoned in virtually every state. For a thorough discussion of the law on this point see the discussion by Mr. Bernard Witkin, California's most distinguished legal scholar, in his *Summary of California Law,* 8th Ed. in Volume 4, Page 2983, et seq., where he discusses this principle and the absolute host of cases which cover the point in question. For Idaho cases so holding, see *Butland v. City of Caldwell,* 51 Id. 483 at 48, 6 P.2d 493 (1931) and *Denton v. City of Twin Falls,* 54 Id. 35 at 43, 28 P.2d 202 (1933).

For one of the lead cases in the United States discussing the law pertaining to the duty of care of workmen who must work in a place of possible danger see *Austin v. Riverside Portland Cement Co.,* 44 C.2d 225, 282 P.2d 69 (1955), a

case where two plaintiffs were injured when a crane with which they were working came into contact with an overhead electricity conduit. The court in said California Supreme Court case points out that the amount of caution required of a workman under such circumstances in the exercise of ordinary care is lessened and that whether the workman is guilty of contributory negligence is a question of fact, that is a jury question and is not to be decided by the court.

Finally, we wish to point out that Section 302 of the Restatement specifically exculpates the plaintiff in a situation where it is admitted that the plaintiff has been negligent or even reckless, where the negligence of the actor is such that he should realize that his act or omission involves an unreasonable risk of harm to another. As an illustration it is pointed out in said Restatement Section that one who leaves a hole in the street which would be easily discovered if a driver were attentive but may not be if the driver is inattentive may nevertheless be held liable. Certainly there is no comparison between the degree of culpability of a defendant under those circumstances compared with the culpability and responsibility of a power company who has actual knowledge of the fact that workmen are working in the very area of their deadly, uninsulated high voltage wires with the foreseeability that serious injury and/or death could occur. Such a situation is a thousand times more serious than the leaving of a hole in the street. See the recent Arizona Supreme Court case on this point *Sulphur Springs Valley Electric Corp., Inc. v. Beltran,* 478 P.2d 128 (1970).

In short the steps and actions which the power company should have taken were at least issues of fact for a jury to decide, and the conduct of DAVID QUEDENS was likewise a question of fact for the jury. And the trial court in depriving the jury of the right to make these determinations took away DAVID'S constitutional right to a jury trial.

2. Liability of the Manufacturer for Failure to Utilize Known Safety Devices—Products Liability

It was a question of fact for a jury to decide whether or not the manufacturer of the tree trimming rig was liable under the doctrines of strict liability and/or negligence for failure to utilize known safety devices to prevent injury or death where the risk of injury and/or death was great—even if it be conceded, which it is not, that the danger was open and obvious, or patent instead of latent.

For many years, hundreds of thousands of workmen and consumers have been barred from recovery because of the infamous rule established in the New York case of *Campo v. Scofield*, 301 N.Y. 468, 95 N.E.2d 802 (1950), which in substance held that there could be no liability for the failure to provide safety devices if the condition in question was patent rather than latent, or obvious rather than concealed. There probably has been no more bitterly criticized rule in the history of American Jurisprudence than the said *Campo* rule. Virtually all of the legal scholars and commentators who have considered the same have pointed out the ridiculousness of the *Campo* rule and how it discourages safety progress on the part of manufacturers and others. In fact, the New York Court which established said

rule itself finally recognized this fact and over-turned its former decision. This was done in the celebrated case of *Micallef v. Miehle Co.*, 89 N.Y.2d 376, 384 N.Y.S.2d 115 (1976). The New York court in the said *Micallef* decision points out that it feels the law ought to encourage safety on the part of manufacturers rather than to discourage it however obvious the unsafe condition might be. *Micallef* in so holding follows numerous other cases which have so concluded.

One of the lead cases which thoroughly discusses this issue is *Pike v. Frank G. Hough Co.*, 2 C.3d 465, 467 P.2d 229 (1970), and then following *Pike*, the celebrated landmark case of *Luque v. McLean*, 8 C.3d 136 (1972), which case involved an injury which occurred because of the open port which was open and obvious but unguarded at the right front of a rotary lawnmower. The California Supreme Court in abolishing the latent versus patent dichotomy stated among other things as follows:

> "It would indeed be anomalous to allow plaintiff to prove that a manufacturer was negligent in marketing an obviously defective product, but to preclude him from establishing his manufacturers strict liability for doing the same thing. The result would be to immunize strict liability manufacturers who callously ignore patent dangers in their products while subjecting to such liability those who innocently market products with latent defects.

The Idaho cases of *Shields v. Morton Chemical Co.*, 318 P.2d 857 (1974), and the more recent case of *Rindlisbaker v. Wilson*, 519 P.2d 421 (1974), while not specifically called upon to decide this specific issue nevertheless cited said

California cases with approval. And we believe that under any reasonable logic that the Idaho court which to date has followed all of the California cases involving advancements in the law of products liability would clearly follow the enlightened rule of *Pike, Luque,* and *Miscallef,* cited *supra.*

Defendant manufacturer relies on the Minnesota case of *Halverson v. American Hoist,* 240 N.W.2d 303 (1976) and the later case of *Jasper v. Skyhook Corp.,* 547 P.2d 1140 (N.Mex. 1976). A careful reading of said cases discloses that they are no authority for holding that the Idaho court would likely follow the *Campo* rule at all. *Halverson* relies on the *Campo* rule which as hereinabove set forth has been both discredited and overturned by the very court that established the rule, and *Jasper v. Skyhook Corp.* in turn relies on the *Halverson* case and does not refer to or indicate any knowledge of the fact that *Campo* as aforesaid has been both discredited and overruled.

In summary the modern trend and clear weight of authority is to hold a manufacturer liable both in negligence and in strict liability for failure to use known safety devices on its products. Proximity warning devices have been in use for many years, and same would have warned DAVID of his close proximity to the deadly uninsulated wires in question. He would have been immediately alerted and could have taken appropriate action to protect himself. One could well argue that the manufacturer is liable as a matter of law for the failure to use such simple safety devices, particularly where the potentiality for serious injury or death is so great. At the very least the question

should have been an issue of fact for the jury, particularly since the tree trimming rig was designed to be used in close proximity to high voltage lines. DAVID QUEDENS was deprived of his constitutional right to a jury trial and was deprived of the right to have a jury decide this issue.

3. Liability of the Bank—Employer for Injuries to Employees of Its Contractor—Special Risk Doctrine

It was a question of fact for a jury to decide whether or not there were peculiar risks of physical harm to the employees of the independent contractor, Davey Tree Company unless special precautions were taken.

Both Sections 416 and 427 of the Restatement of Torts impose a non-delegable duty on the employer of an independent contractor to his employees where there are peculiar risks of physical harm at the work place, unless special precautions are taken. Under Section 416, such liability is imposed even if the contractor has agreed to be fully responsible for all such risks. [There is no evidence, however, that the contractor had made any such agreement in the instant case.]

Said sections in no way limit the employer's liability to accidents which might occur on the employer's property only. Said sections and the cases interpreting same speak in terms of the work area or place, rather than to the issue of whether or not the employer owns said workplace.

The celebrated case of *Van Ardsdale v. Hollinger,* 68 C.2d 245, 437 P.2d 508 (1968) considered and decided the issue of whether or not the intent of said Restatement Sections was to apply them to employees of independent con-

tractors, and the California Supreme Court held very decisively that such was the intent. In this regard, the California Supreme Court, at page 254 states as follows:

> "This court has held that employees of an independent contractor come within the word 'others' as used in sections 413, 414 and 428 of the Restatement of Torts, which like Section 416, set forth rules relating to the liability of one hiring an independent contractor. . . . It has recently been held that Section 416 of the Restatement of Torts is applicable in California in an action by an employee of the independent contractor . . . , and other jurisdictions have extended the liability of one who hires an independent contractor to do dangerous work to the employees of the contractor. See 23 A.L.R. 1084, 1129-1135." (*Van Arsdale, supra,* at p. 254.) (Emphasis added.)

The *Van Arsdale* court then went on to hold the defendant liable as a matter of law for failing to eradicate the markings of the white lines on a busy street while one of the three lanes was kept open to traffic. The court held that absent special precautions to keep the traffic proceeding in the open lane from going into the other lanes, the work was highly dangerous, and that the necessity for such precautions was inherent in the work and was obvious before the work commenced. The court further stated that while the contract of the defendant provided for the contractor to take special precautions, this makes no difference because *this duty is non-delegable*, and that therefore the employees of the independent contractor could recover from the defendant city for the failure of the contractor to take precautions to protect said employees, and likewise because the defendant city had a non-delegable duty.

In the instant case, we cannot possibly conceive of any special risk, danger or hazard that could be any greater than that presented by high voltage lines such as the ones in this case, which were unguarded, unprotected and uninsulated, and which were in the very heart of the construction site area, that is, in immediate proximity to the trees which the defendant Bank had hired the contractor to trim. Certainly such a risk should fall within the type of special risks contemplated by the Restatement sections hereinabove set forth, and the Bank should be deemed to have a non-delegable duty. In fact, we feel that the Bank should be held liable *as a matter of law, just as the California Supreme Court did* in the *Van Arsdale* case cited *supra.* We submit that certainly, at the least, there is a genuine issue of fact as to whether or not the said Bank, which owned the land immediately adjacent to said wires and which was getting ready to construct a new building on said property, should fall within the special risk doctrine. We submit, indulging in all evidence and inferences favorable to plaintiff, that plaintiff is clearly entitled to his day in court on this issue.

DAVID QUEDENS was deprived of his constitutional right to have a jury decide these issues as to the defendant Bank. If there was going to be any granting of judgment as a matter of law, it should have been in favor of DAVID QUEDENS rather than the Bank as was done in the said *Van Arsdale* case cited *supra.*

II.

THERE WAS CLEARLY JURISDICTION OVER THE DEFENDANT MANUFACTURER UNDER BOTH CASE LAW AND THE IDAHO STATUTE—IN A PRODUCTS LIABILITY CASE

It is frankly incomprehensible that the trial court and in turn the appellate court found that there was no jurisdiction in Idaho over the defendant manufacturer, in light of all of the recent cases in the products liability field on the issue of jurisdiction and further under the Idaho case law itself and under the Idaho long-arm statute. The unmistakable and clear trend of the courts in this country has been to invoke jurisdiction against manufacturers in products liability cases who manufacture their products in one state but place them in the stream of commerce with knowledge that they may be used in any one of the 50 states and cause injury if defective in design or manufacture. One of the most recent cases discussing this stream of commerce theory in products liability cases is *Fields v. Volkswagen of America, Inc.*, 555 P.2d 48 (1976). The Oklahoma court held that following the fundamental fairness doctrine set forth in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), that if a manufacturer places its product into the stream of commerce with knowledge that it can be used in the State of Oklahoma and that if defective it could cause injury, that this was a sufficient jurisdictional basis for due process and compliance with fundamental principles of fairness. The Idaho Supreme Court also has clearly followed the stream of commerce theory and did so even before said *Fields* case in *Doggett v. Electronics Corp. of America, et al.*, 454 P.2d 63 (1969).

If anything the language in the *Doggett* case is even stronger than that in the *Fields* case.

Finally, the Idaho Supreme Court makes it very clear in *Doggett* that under the Idaho long-arm statute, namely Idaho Code § 5-14, Subdivision B, if a tortious act is committed in the State of Idaho, this alone is a sufficient basis for jurisdiction. The court holds that a tortious act may be a combination of not only the negligent act but also the injury, and that for an act to be tortious there must be injury, and that accordingly the concept of injury is an inseparable part of the phrase. And that accordingly under the Idaho long-arm statute where the injury occurs in Idaho, there is no question but what there is jurisdiction.

In short, under both the stream of commerce theory which applies in Idaho in products liability cases and elsewhere and also under the Idaho long-arm statute, the lower court is clearly wrong in holding that there is no jurisdiction in Idaho since the tortious act and/or injury occurred in the State of Idaho.

III.

TRIAL COURT VIOLATED EVERY KNOWN RULE OF LAW APPLICABLE TO MOTIONS FOR SUMMARY JUDGMENT

It is elementary horn-book law and certainly elementary federal law that the party against whom a motion for summary judgment is made must be given the benefit of all favorable inferences and doubts, and that all pleadings, affidavits, and other documents must be liberally construed in that parties favor and that if there is any doubt it must

be construed against the party who makes the motion for summary judgment. Further, whereas in the instant case, the issue was raised of the intent or state of mind of young DAVID QUEDENS it is highly unusual and extraordinary for a trial court to determine that issue on a motion for summary judgment.

One of the lead cases setting forth these principles and particularly the one pertaining to the state of mind issue, is the case of *Consolidated Electric Co. v. United States of America for use and benefit of Gough Industries, Inc.*, 355 F.2d 437 and 438. For some of the numerous other authorities setting forth these elementary rules, see the numerous cases cited in 73 Am.Jur.2d, in the section on Summary Judgments, § 35 at Pages 763 to 764, and 6 *Moore's Federal Practice*, § 56.03 (10, at Page 2043 (2 Ed. 1953)).

The trial judge in the instant case incredibly ignored each and every one of these elementary rules, as has hereinabove been set forth. *How he could decide on a motion for summary judgment that DAVID QUEDENS was bent on an act of self-destruction when as set forth in the factual portion of this Petition he had just told his fellow worker that after this last run they would go home and do their laundry, is totally incomprehensible.* We could take each of the issues hereinabove more fully discussed and make similar observations. With reference to each one of said issues, while one might make some kind of an argument to the contrary as did the trial judge in the instant case, one can make equally strong and credible arguments the other

way and these decisions were for the jury and not the trial judge.

In summary every known rule of federal law pertaining to how summary judgments should be handled was violated in this case, and this court should remind trial courts of the purpose of summary judgments and of what their powers and limitations are so that cases which *make a mockery of justice like this one don't continue to occur in the future.*

CONCLUSION

We respectfully pray that this Petition be granted.

Dated: May 21, 1979.

ROBERT E. CARTWRIGHT, ESQUIRE
WALTER H. MEDAK, ESQUIRE
BRUCE O. ROBINSON, ESQUIRE

CARTWRIGHT, SUCHERMAN,
SLOBODIN & FOWLER, INC.

By ROBERT E. CARTWRIGHT
Attorneys for Petitioner

(Appendices Follow)

Appendices

Appendix A

United States Court of Appeals
for the Ninth Circuit

Joan E. Helm, individually & as Guardian ad Litem for David William Quedens, an incapacitated person, Plaintiff-Appellant vs. Pacific Power and Light Co., a Maine corp., Mobile Aerial Towers, Inc., an Indiana corp., and The Idaho First National Bank, a National Assoc., Defendants-Appellees Davey Tree Expert Co., a foreign corp. and Aetna Casualty & Surety Co., a foreign corp., Plaintiff-Intervenors	No. 77-1352
Joan E. Helm, etc., Plaintiff-Appellant, vs. Pacific Power & Light Co., etc., et al., Defendants-Appellees Davey Tree Expert Co., etc., et al., Plaintiff-Intervenors	No. 77-1353

[Filed November 30, 1978]

Appeal from the United States District Court
for the District of Idaho

MEMORANDUM

Before: VAN DUSEN,* WRIGHT and GOODWIN, Circuit Judges.

This appeal is from an August 1976 district court judgment granting the defendants' motions for summary judgment and an October 1976 order denying the plaintiff's Federal Rule of Civil Procedure 60(b) motion. After consideration of oral argument and the record, the district court judgment and order will be affirmed.

Plaintiff-appellant, David Quedens, 22, represented by his mother and guardian ad litem, Joan E. Helm, suffered severe injuries resulting in the loss of all mental capacity and speech and part of both of his arms when he simultaneously touched uninsulated high voltage wires while performing tree-trimming work. He was employed by Davey Tree Expert Co. (Davey Co.), of Boise, Idaho, and was working pursuant to a contract between Davey Co. and the defendant-appellee, Idaho First National Bank. Quedens had previous tree-trimming experience, having worked for Davey Co. and a California company before entering the armed services in 1971. Quedens returned to Davey Co. in March 1973. The accident occurred on July 13, 1973.

Prior to the granting of the bid by the defendant Bank to Davey Co., Quedens accompanied James Marria, a sales representative and his former supervisor, to the job site to analyze the work required. At this time, Quedens' attention was directed to the power lines owned by the defendant-appellee, Pacific Power & Light Co. (Power Co.), and he was reminded of the necessary safety precautions which he

*Senior Circuit Judge for the Third Circuit.

had learned two years before. Marria instructed Quedens not to get the bucket, which was at the end of a hydraulically extendable mobile tower, or any part of the boom nearer than six feet from the power lines.

On the day of the accident, Quedens and his assistant, Sharpe, were using a truck manufactured by defendant-appellee, Mobile Aerial Towers, Inc. (Mobile), which held a boom carrying a bucket measuring three feet by one and one-half feet by three and one-half feet deep. There were no devices on the machinery to detect proximity of electrical wires. Quedens was located in the bucket, which had controls to operate the boom. There was also a control panel in the truck to lower the boom in case of emergency.

Quedens had trimmed two sides of the trees from the inside of the Bank's lot and then moved the truck with the bucket into the adjoining street, approximately 15 feet from the tree he was about to trim. The three uninsulated wires, almost two times the minimum height required by the safety code, were 39 feet above the street and spaced three feet from each other. They passed diagonally over the street and over and above the trees where the work was to be performed. At this point, Quedens raised the boom and the bucket to a position one foot below and between two of the three wires. He was then standing between the two wires, which were approximately at the level of his waist. Quedens raised his hands and arms above the wires and appeared to be shouting or talking to Sharpe on the ground. Plaintiff then suddenly dropped his arms to his sides and both hands touched the wires, resulting in the injuries suffered. The boom was immediately lowered through the emergency controls in the truck. At the

time of the contact, the bucket was positioned over the street and "a good 15-20 feet away from the closest limb."[1]

Quedens' immediate superiors and his co-workers regarded him as a competent, experienced and knowledgeable tree trimmer and boom operator in the vicinity of power lines. As a part of Davey policy, Marria had conducted in 1971 weekly safety meetings for the benefit of his crews. Quedens participated in these "tailgate" meetings in 1971. Also, Marria stressed to his crew the dangers involved and that they should be "extremely careful in operating our high-rise booms near these power lines."

During the time that Quedens was trimming trees in the area of the new bank site, no Power Co. official or employee was contacted, advised, or informed by any bank officials, architects, or employees of the tree-trimming contractor that any contractor or its employees would be working within 10 feet of the Power Co. power lines. There was no evidence that Power Co. was aware prior to the time of the accident that the type of boom used in the area could be raised to a height whereby it could come in contact with the overhead transverse voltage lines.

Plaintiff brought suit against defendants Power Co., Mobile and Idaho First National Bank. Upon motions of the defendants for summary judgment, oral argument was heard. The district court granted the motions and entered judgment for all defendants. Plaintiff filed an appeal to this court and a F. R. Civ. P. 60(b) motion to the district court for relief on the basis of newly discovered evidence

[1]Deposition of Boyle, pp. 66-67; see also deposition of Sharpe, p. 59, lines 22-24.

in the form of expert opinions. The district court subsequently denied the Rule 60(b) motion.

I. *Summary judgment was properly granted.*

The summary judgment motions were properly granted. The record does not demonstrate any genuine issue of material fact.[2]

[2]James G. Marria executed under oath an affidavit in May 1976 which commences with these paragraphs (R. 597-98):

"JAMES G. MARRIA, after first being duly sworn deposes and says:

"That during the summer and fall months of 1971 I was employed as a foreman of a tree trimming crew for the Davey Tree Expert Company. Our crew was working out of Boise, Idaho. David Quedens was a member of my crew during approximately the months of July, August and September, 1971.

"Our crew's exclusive function during this period of time was to trim trees along utility power lines. We worked forty-five (45) hours a week clearing trees from these power lines.

"As part of my job responsibility as foreman of this crew, I did conduct weekly safety meetings for the benefit of my crew. These meetings were referred to as 'tailgate' meetings. Because we were constantly working around power lines during these 'tailgate' meetings I would stress to my crew members, which included David Quedens, that they should be extremely careful in operating our high rise booms near these power lines. My crew was instructed that the bucket containing the operator should never be positioned closer than six feet from any power-line. Because I personally stressed the importance of the fact that an operator should never maneuver his bucket closer than six feet to these power lines I knew that David Quedens as one of my crew members was personally aware of my company's safety policies in this regard. Every member of my crew, which included David Quedens was fully aware of the potential danger involved in working around power lines.

"In my opinion, David Quendens was a competent operator of the Mobile Aerial Tower's 'cherry picker boom' and was experienced in trimming trees in the vicinity of power lines.

"That on or about March of 1973 David Quedens was rehired by Davey Tree Experts Company. At this time I was working as a sales representative for Davey Tree Experts Company. David Quedens was, during this period of time, working

There is no evidence on the record refuting Morria's statement that he had specifically warned Quedens of the

as foreman of a crew that did residential and commercial tree trimming.

"That on or about the later part of June, 1973, I was preparing a bid for tree trimming work at the request of The Idaho First National Bank. That bank wanted the trees near their Sandpoint Branch office trimmed.

"I knew if we got that bid David Quedens' crew would be assigned to perform that work. Because I wanted him to be familiar with the job site and the nature of the work to be done, I had David Quedens accompany me to the location of The Idaho First National Bank in Sandpoint, Idaho. David and I drove to Sandpoint to analyze the work to be done and to prepare a bid for the job."

The plaintiff attempted to cast doubt on Marria's affidavit by asserting that Sharpe, Quedens' assistant, had not been specifically trained in dealing with high voltage wires since Marria had stated that Quedens was so trained. However, the meetings at which Quedens received his training from Marria were in 1971, when Marria was Quedens' foreman. This is made clear by the language in the foregoing paragraphs. Sharpe was not employed with Davey Tree at that time. Upon Quedens' return to Davey Tree and the subsequent hiring of Sharpe, Marria was made a sales representative and Quedens became foreman.

Also, the affidavit of Marria contains these paragraphs at R. 598-99:

"When we viewed the premises we discussed the type of trimming work that needed to be done. Some of the trees needed to be rounded over and given a symetrical shape and other trees needed to have the dead limbs removed. During this discussion I called David's attention to the location of the power lines near the trees that were to be trimmed and instructed him to be careful and not to get the bucket or any part of the boom any closer than six feet from the power lines.

"That David Quedens was familiar with the work to be done and aware of the location of the power lines near the job site.

"After this site investigation I submitted our bid to The Idaho First National Bank and they accepted our bid and gave us the job. I assigned David Quedens' crew to perform the work.

"Immediately after I learned of David Quedens' injury on July 13, 1973 I went to the scene of the accident in Sandpoint. I positioned the truck exactly where David Quedens had it positioned at the time he was injured. I then raised the boom and bucket so I was positioned near the power lines contacted by David Quedens. I determined from this location that there

wires. In addition, Quedens' position between the wires, as well as the witness Boyle's statements, indicates that plaintiff was aware of the wires.

was no reason for David Quedens to be in this position to carry out his job of trimming the trees."

On this record, there was no apparent reason for Quedens to be in this position to perform his tree trimming job. The district court stated in its Memorandum Decision, *inter alia:*

"Here Quedens knew of the purpose of the 'insulating link' and the absence of a proximity warning device. Most certainly beyond any doubt, he was fully aware of the danger of operating it in close proximity to high voltage lines. He nevertheless put himself in a totally unreasonable (if not unbelievable) position between two closely-spaced high voltage lines. In short, Quedens . . . voluntarily and unreasonably proceeded to a face-to-face confrontation with danger. . . .

"The conduct of Quedens, when one views his actual prior and then knowledge of all of the general and specific circumstances, his experience in the business, the safety training sessions of his employer, and the oral and written warnings actually known and given, takes on the appearance of an act of virtual self-destruction . . . ."

Helm, etc., et al. v. Pacific Power & Light Company, et al., Aug. 13, 1976 (D. Idaho, Civil 2-75-19), at R. 749.

During the oral argument, plaintiff's counsel responded to the contentions of defendants that plaintiff had not taken any depositions or filed any affidavits, so that no disputed issues of fact appeared in the record, by saying that he relied on answers to interrogatories. However, plaintiff's counsel attached to plaintiff's answers to interrogatories medical reports of Quedens containing this wording describing his inability "prior to his injury" to accept himself as being worthy of friendship and other pre-injury psychotic problems which were not inconsistent with the district court's above-quoted evaluation of his behavior at the time of the accident:

"David had a very troubled social history, marked by sexual identification problems, an unsuccessful marriage and an abortive attempt at military service. His mother, Mrs. Helm, reports that his life-style had stabilized somewhat immediately prior to his injury and that he was beginning to establish a network of friends, although he couldn't accept himself as being worthy of friendship. [R. 148]

. . .

"From his social history prior to his injury apparently the patient had a great deal of difficulty in adjusting to his sexual identity because of problems related to his father. . . .

"We will proceed to have the patient committed to Dammasch State Hospital for evaluation to determine if this is a

II. *The doctrine of momentary forgetfulness and § 302A of the Restatement of Torts do not permit recovery by the plaintiff on this record.*

Plaintiff's counsel cites no Idaho law adopting the principle which he calls the doctrine of momentary forgetfulness. Moreover, the principal case cited by plaintiff in support of the application of this doctrine, *Austin v. Riverside Portland Cement Co.*, 282 P.2d 69 (Cal. 1955), is clearly distinguishable from the situation presented by this record.[3]

Plaintiff also directs the court's attention to § 302A of the Restatement (Second) of Torts (1965).[4] That doctrine, however, is based on the inattentive or negligent acts of a person other than the injured plaintiff. See *Sulphur*

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psychotic break or all related to organic brain disease. We felt that if it is a psychosis and it can be treated then we would be very interested in working on the physical restoration; however, if this is all related to chronic brain syndrome secondary to anoxia, it is our feeling the patient will need institutional care for the rest of his life." [R. 150]

Also, the plaintiff's answer to Power Co.'s interrogatory 63, requesting identification of persons "who you expect to call as an expert witness at . . . trial:"

"At this time no expert is known who is expected to be called at the time of trial." (R. 109)

discloses that plaintiff had no evidence from expert witnesses to offer in his case. As noted below, experts relied on after the summary judgment order of August 1976 could not be considered by the district court, as stated in its October 12, 1976, order.

[3]In that case the two plaintiffs, apparently informed about the wires, were instructed to work at night when only minimal lighting was available. Further, the plaintiffs themselves did not come in contact with the power lines, but rather the machinery made the contact.

[4]Section 302A of the Restatement (Second) of Torts provides: "An act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the negligent or reckless conduct of the other or a third person."

Springs Valley Electric Corp. v. Beltran, 478 P.2d 128 (Ariz. 1970). Quedens, however, had knowledge of the wires, was experienced in dealing with high voltage wires, and his position in relation to the trees he was about to cut was improper.[5] As noted above, Quedens' actions go beyond mere inattentiveness and border on intentional and deliberate conduct. *Cf. Sulphur Springs Valley Electric Corp. v. Beltran, supra.*

III. *Liability of Power Co.*

Although the record shows that the Power Co. knew of the tree-trimming activity prior to the accident, there is no evidence that it knew the Mobile bucket could be raised to the point of contact 39 feet above the ground, which was many feet above the minimum clearance required by law and industry standards.[6] The grant of summary judgment for the Power Co. on this record is supported by *Probart v. Idaho Power Co.*, 74 Idaho 119, 258 P.2d 361 (1953).

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[5]Plaintiff contends in his brief that the position of Quedens at the time of the accident was not improper or unexplainable, since he was evaluating the size and shape of the tree before proceeding with the cut (appellant's brief at 11). Although plaintiff cites no record or other support in his brief for this explanation, Sharpe's deposition makes vague references to Quedens' "usually look[ing] at [the trees] from a distance," but gave no estimate of that distance (Sharpe's deposition at 139). Also, there was no evidence that Quedens was looking at trees when he dropped his arms to his side.

[6]Plaintiff cites *Burke v. Illinois Power Co.*, 373 N.E.2d 1354 (Ill. App. 1st Dist., 3d Div. 1978), in support of his position. However, *Burke* is clearly distinguishable. In *Burke* a number of employees admitted seeing the plaintiff's crane in close proximity to the power lines and, against proper company practice, did not warn individuals nor file a report with their supervisors. Moreover, the employees stated that lay persons (the plaintiff) could not be expected to judge distances of power lines above them and it was, therefore, necessary to warn them of the danger.

IV. *Liability of the Bank*

Under Idaho law, an employee of an independent contractor is an invitee upon the premises of the owner or proprietor, *Carr v. Wallace Laundry Co.*, 170 P. 107 (Idaho 1918), and a landowner has no duty to warn of open and obvious dangers of which an employee knew or should have known. *Otts v. Brough*, 409 P.2d 95 (Idaho 1965); *Ramon v. Interstate Utilities Co.*, 170 P. 83 (Idaho 1917). Therefore, even assuming that Quedens had not been previously warned, the landowner would not be liable since the evidence in the record shows that there was nothing obstructing Quedens' view of the wires.[7]

Idaho law also dictates that an employer of an independent contractor is not liable for the acts and omissions of the independent contractor unless the employer retains control over the details of the work. *See Ramon v. Interstate Utilities Co.*, 31 Idaho 117, 170 P. 88 (1917). No such control was maintained by the Bank. It did not direct the manner of trimming the trees.

The plaintiff primarily relies on §§ 416 and 427 of the Restatement (Second) of Torts, which create an exception to this general rule. They impose a non-delegable duty on the employer of an independent contractor where there are peculiar risks of physical harm to others, unless special precautions are taken, in situations where the employer

[7]Plaintiff's Rule 60(b) motion was based on the "newly discovered" evidence of the opinion of Scott Beamer, an electrical engineer, who conducted an experiment and concluded that it would have been impossible for Quedens to have seen the wires if he was moving about in the manner described by Boyle and Sharpe. This Rule 60(b) motion was properly denied. See discussion below at pp. 12-13.

should recognize such risks. The plaintiff cites no Idaho case law adopting this view. In any event, the sections are inapposite to the case at bar where there is no allegation or evidence that the independent contractor, Davey Co., was negligent.[8] Moreover, the power lines were not over the Bank's property. The Bank did not own them, maintain them or have control over them, and Quedens was not on Bank property when the accident occurred.[9]

V. *Liability of Mobile*

We agree with the district court that the motion to dismiss filed by Mobile must be granted because there was no jurisdiction *in personam* over that company. See *Helm, etc., et al. v. Pacific, etc., supra* at R. 747-48.[10]

[8]The Introductory Note to § 416 of the Restatement states that this section does not rest upon personal negligence of the employer of the independent contractor, but upon vicarious liability, for the failure of the independent contractor to exercise due care.

[9]The plaintiff cites *Burke v. Illinois Power Co.*, 373 N.E.2d 1354 (Ill. App. 1st Dist., 3d Div., 1978), in support of the Bank's liability. However, in *Burke* the owner kept supervisors at the site at all times and had the power to stop the work if an unreasonable danger arose. *Id.* at 1370.

[10]Assuming, for the purposes of argument, that Idaho had jurisdiction over Mobile, we conclude that Mobile was not liable for Quedens' injuries.

The plaintiff relies on the theory of strict liability in tort, § 402A of the Restatement (Second) of Torts, which has been adopted by Idaho. *Shields v. Morton Chemical Co.*, 518 P.2d 857 (Idaho 1974). No defect in the boom, bucket or its mounting or control apparatus has been asserted. There is some evidence that proximity warning devices are used on other types of equipment, but these are long, ground-operated booms and cranes. In addition, signs warning of the dangers of the use of the boom in proximity to high voltage lines were furnished by the manufacturer and were in place on the equipment. Quedens knew of these warnings and of the danger of bringing the boom and the bucket too close to the wire.

The plaintiff asserts that it is irrelevant, in imposing liability, that the defect or danger is patent and cites *Micallef v. Miehle Co.*, 89 N.Y.2d 376, 384 N.Y.S.2d 115 (1976). The plaintiff contends that

VI. *Plaintiff's Motion for Reconsideration Pursuant to F. R. Civ. P. 60(b).*[11]

We find this motion properly denied and agree with the reasons set forth in the district court order of October 12, 1976. This motion is within the sound discretion of the trial court and, on appeal, the trial court's decision will not be disturbed unless there is demonstrated an abuse of discretion. *Schepp v. Langmade,* 416 F.2d 276 (9th Cir. 1969). Motions to reconsider based on newly discovered evidence under Rule 60(b)(2) must demonstrate that the evidence discovered is new and could not have been discovered by

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Micallef repudiated the old rule in *Campo v. Scofield,* 301 N.Y. 468, 95 N.E. 2d 802 (1950), which precluded recovery unless a latent defect or danger unknown to others was alleged and proven. *Micallef* did not expressly overrule *Campo,* but merely stated dissatisfaction with the rigid approach taken in *Campo.*

This court is not persuaded that the Supreme Court of Idaho would impose liability under facts similar to those involved here. Indeed, the New Mexico Supreme Court recently rejected a similar claim, and relying in part on Idaho case law held that a manufacturer of a 100-foot telescopic crane sold without either a proximity warning device or an insulated link was not liable under a theory of strict liability as a matter of law. *Jasper v. Skyhook Corp.,* 560 P.2d 934 (N. Mex. 1977). See *Rindlisbacker v. Wilson,* 95 Idaho 752, 519 P.2d 421 (1974); *Garner v. Crater Farms, Inc.,* 96 Idaho 383 (1974); *Mico Mobile Sales & Leasing v. Skyline Corp.,* 97 Idaho 408 (1975).

We also note plaintiff's cite to *Parker v. Lull,* 573 P.2d 443 (Cal. 1978), but find no indication that Idaho would similarly interpret § 402A at this time. We also find the facts of that case sufficiently distinguishable and, therefore, not persuasive authority in deciding the case at bar.

[11]Although the district court considered this motion for reconsideration, filed August 24, 1976, as a motion to alter and amend the judgment of August 13, 1976, under F. R. Civ. P. 59(e), see R. 795, it would appear that such a motion was untimely as there is no record evidence that it was served within 10 days of August 13 and it was not filed until August 24, 1976 (R. 757). For this reason, the court's order of October 13, 1976, denying the August 24 motion, has been treated as denial of a motion filed under F. R. Civ. P. 60(b).

the exercise of due diligence. 7 Moore's Federal Practice ¶ 60.23[4].

Plaintiff brought the motion on the basis of information received from an expert, Scott Beamer, an electrical engineer, who conducted an experiment at the site and concluded that it would have been impossible for Quedens to see the wires while he was in the bucket, moving in the manner described by Sharpe and Boyle. The plaintiff asserted that there was insufficient time to discover this expert advice due to time constraints in other unrelated matters.

The argument on the motions for summary judgment was heard on June 1, 1976, after one request by plaintiff for a continuance had been granted. After oral argument, the court gave the parties an opportunity to supplement their authorities. Counsel for plaintiff did not file any supplemental documents, even though he had arranged for the experiment by Mr. Beamer, which had taken place on July 13, 1976. On August 13, 1976, the court granted defendants' motion for summary judgment. Subsequently, on August 24, 1976, plaintiff filed her Rule 60(b) motion for reconsideration. Counsel for plaintiff states that Mr. Beamer conducted the "experiment" on July 13, 1976. There has been no showing that with due diligence such evidence could not have been presented to the court before August 13. Also, it would appear that at least parts of the declaration of Beamer were not admissible since he had no personal knowledge of many of the alleged facts

contained in it. See F. R. Civ. P. 56(e).[12] Also, the attached affidavit only states that he "acknowledged" before the notary public "that he executed the same" (R. 763).

The district court order of October 12, 1976, denying the motion for reconsideration filed August 24, 1976, will be affirmed.

[12]For example, the declaration states that Beamer was "informed about the position of Quedens at the time of the accident by Alex Sharpe" (R. 761, lines 3-5) and that "Jim Carlson went up in the bucket himself and confirmed to me . . . that the wires could not be seen from this position." Also, the affidavit does not state that the facts recited in it are true and correct under oath or show that "the affiant is competent to testify to the matters stated therein." See F. R. Civ. P. 56(e). There is no way to ascertain what facts or opinions are based on his observations or those of others such as Carlson and Sharpe.

Appendix B

In the United States District Court for the District of Idaho

Civil No. 2-75-19

Joan F. Helm, Individually and as Guardian ad Litem for David William Quedens, an incapacitated person,
Plaintiff,

Davey Tree Expert Company, a foreign corporation, and Aetna Casualty & Surety Co., a foreign corporation,
Plaintiff-Intervenors,

vs.

Pacific Power and Light Company, a Maine corporation; Mobile Aerial Towers, Inc., an Indiana corporation; and The Idaho First National Bank, a National Association,
Defendants.

[Filed August 13, 1976]

MEMORANDUM DECISION AND ORDER

The motions of all defendants for summary judgment have been briefed, argued and submitted. The motions are supported by answers to interrogatories, depositions, exhibits and affidavits. There is virtually no dispute or contradiction as to the material, genuine and dispositive facts.

Also under submission is Mobile's motion to dismiss and to quash service of process.

I.

STATEMENT OF FACTS

Plaintiff, David Quedens (Quedens) was first employed by Davey Tree Expert Company (Davey) at Boise, Idaho, from May to September, 1971, and from March to July 13, 1975. He had had some prior experience in tree trimming in California. His duties during the latter period were as a tree trimmer and crew foreman pursuant to instructions from his employer, Davey.

In the latter part of June, 1975, James Marria, a supervisor for Davey (and under whom Quedens had also worked in the 1971 period) was preparing a bid for tree trimming work for defendant, The Idaho First National Bank (Bank), on or near a lot owned by the Bank in Sandpoint, Idaho. If Marria's bid was accepted, he knew that Quedens and his crew would be assigned to the job. To insure Quedens' familiarity with the job site and the details of performance, Quedens accompanied Marria to Sandpoint.

While there the premises and physical features were viewed by both and instructions were given by Marria to Quedens as to the method and manner of trimming and Quedens' attention was specifically directed to the three power lines of defendant Pacific Power & Light Company (P. P. & L.) which passed diagonally over Second Street and over and above the trees near where a portion of the work was to be performed. The placement of these lines, which were not insulated except by height, were almost two times the minimum height required by the applicable safety code and public utility commission regulations, i.e., at the point of the tragedy 39 feet above street level. (The hearing

photographic exhibits No. 1, 2, 3, 4 and 5 graphically and clearly illustrate the physical situation with respect to the street, power pole, the overhead lines involved and the location of the Davey truck with defendant Mobile Aerial Towers, Inc.'s (Mobile) tower mounted thereon in the down position.) Marria instructed Quedens not to get the bucket (at the end of the hydraulically-extendible mobile tower) or any part of the boom nearer than six feet from the power lines. He had received previous safety instructions in the same vein.

The Bank accepted the bid and Quedens and his crew were assigned to do the work.

On July 4, 1975, Quedens, with his crew, an Alex Sharpe, traveled from Boise to Sandpoint. On July 6, 1975, Quedens and Sharpe inspected the site and planned their tree trimming and removal operations. In this they had a plat or chart of the area and the trees prepared by some other Davey employee. They commenced performance on July 7, 1975, and the work progressed without incident until the afternoon of July 13, 1975. Tree trimming had been done on the "inside" of the trees which overhung into the property of the Bank. The trees were not on Bank property. They were growing on public property of the City of Sandpoint, but were trimmed anyway pursuant to contract and instructions. To trim the "outside" of the trees the Davey truck with the Mobile tower was moved into the street and positioned for each tree. The truck was 4-6 feet from the curb and in the public street.

At the tree at the point where the accident occurred the truck was positioned directly under the power lines.

Quedens was in the bucket operating it and the boom from controls in the bucket. Being constructed of fiber glass material, the bucket was insulated against grounding. Quedens raised the boom and bucket to a position which resulted in the bucket stopping approximately one foot below and between two of the three wires. Quedens was then standing between the two wires which passed at about waist-level. He raised his hands and arms above the wires, appeared to be shouting or talking to Sharpe on the ground, and suddenly dropped both arms to his sides, making contact with both wires and sustaining severe and tragic personal injuries. Sharpe lowered the boom by the ground controls on the truck.

At the time of contact the bucket was positioned some 15-25 feet into the street and away from the tree trimming work area. There was no apparent reason or necessity for Quedens to be in this position to perform his tree trimming task.

Much of this detail comes from the uncontradicted testimony of one Lloyd Boyle, an independent and disinterested witness at the scene, as well as from Sharpe, Quedens' subordinate crew member.

No defect in the boom, the bucket or its mounting or control apparatus has been asserted or shown. All of the evidence is that it was in good condition and operating normally and smoothly. The manufacturer, Mobile, does not install electro-alarms or proximity warning devices on the boom or bucket. Plaintiffs supplied no evidence that it is feasible to do so, or is required by any code, regulation or industry safety standard. There is some evidence

that they are available, but are used only on other types of equipment working in close proximity to high voltage power lines, i.e., long ground-operated booms and cranes.

Quedens' immediate superior and his co-worker regarded him as a competent, experienced and knowledgeable tree trimmer and boom operator in the vicinity of power lines.

Signs warning of the dangers of the use of the boom in proximity to high voltage lines were furnished by the manufacturer, Mobile, and were in place on the equipment prior to and at the time of the accident.

As a part of Davey policy, Marria conducted weekly safety meetings for the benefit of his crews. Quedens participated in these "tailgate" meetings. Marria stressed to his crew the dangers involved and "that they should be extremely careful in operating our high rise booms near these power lines." Marria affidavit, pp. 1-2.

Other uncontradicted facts will be discussed hereinafter.

II.

SUMMARY JUDGMENT MOTION OF THE BANK

Plaintiffs (original and in intervention) claim the Bank violated duties to provide Quedens with a reasonably safe place to work and for its failure to inspect and warn him of hidden dangers. The undisputed facts above do not demonstrate a breach of any such duties, if they in fact apply to the Bank.

The Bank was not the owner nor in control of the public street nor of the instrumentality inflicting the injuries. Even if it be held that it assumed some duty or obligation

by contracting with Davey to have trees trimmed that it did not own, there has been no breach of duty to plaintiffs.

It was a reasonably safe place to work. The Bank had no control over the performance of the details of work. *Deshazer v. Thompson,* 89 Idaho 347, 404 P. 2d 604 (1965); 41 Am. Jur. 2d., Sec. 27, p. 783. The dangers, if any, in the working area were open, obvious and patent and not hidden or concealed. Quedens was experienced and competent and had been previously specifically warned by his employer. *Otts v. Brough,* 90 Idaho 124, 131, 409 P. 2d 95 (1965); *Ramon v. Interstate Utilities Co.,* 31 Ida. 117, 128, 170 Pac. 88 (1917); *Gagnon v. St. Maries Power & Light Co.,* 26 Ida. 87, 141 Pac. 88 (1914). *See also,* 31 A.L.R. 2d 1375, 1381-2, and *Christy v. Florida Power & Light,* 232 So. 2d 744 (1970). Indeed, the Bank, in all probability, had a right to rely on the superior knowledge and experience of Davey and its employees.

III.

SUMMARY JUDGMENT MOTION OF PACIFIC POWER AND LIGHT

There is, of course, no question of the ownership, control and maintenance of the uninsulated high voltage lines crossing over Second Street. The uncontradicted affidavit of Bert Leonard, P. P. & L.'s manager, establishes that P. P. & L. was in full conformity with and exceeded applicable federal and state statutes and regulations and industry standards. It is further uncontradicted that there were no defects in the "tap lines" contacted by Quedens

or any materially-related apparatus. The minimum clearance required for an energized line under the circumstances and at the location in question was 20 feet. Immediately after Quedens contacted the lines, the vertical distance was measured at 39 feet from street level to the lines. The point of contact, as measured by Leonard, was 25 feet West of the trees being trimmed.

These facts create prima facie evidence of the absence of negligence. *Probart v. Idaho Power Co.,* 74 Idaho 119, 258 P. 2d 361 (1953). Although power companies have the highest duty of care, *Probart, supra,* they are not insurers of those working near such transmission lines. *Clough v. New England Tel. & Tel. Co.,* 172 N.E. 2d 113 (Mass. 1961).

P. P. & L. was not required to anticipate or foresee this remote possibility nor to warn nor was it under a duty to insulate at a height of 39 feet. *Probart, supra; Clough, supra; Berry v. Atlantic Coastline Railroad Co.,* 273 F. 2d 572 (4th Cir. 1960); *Manaia v. Potomac Elec. Power Co.,* 268 F. 2d 793 (4th Cir. 1959), *cert. denied,* 80 S. Ct. 255; *Hall v. Lorain-Medina Elec. Coop.,* 148 N.E. 2d 232 (Ohio App. 1957).

On this motion for summary judgment, in the face of the prima facie showing by P. P. L., it was incumbent upon the plaintiffs to produce some credible evidence to rebut the prima facie absence of negligence. This they failed to do. Mere assertion and speculations in the briefs will not suffice.

IV.

MOTION TO DISMISS AND QUASH AND FOR SUMMARY JUDGMENT OF MOBILE

A. *Motion to Dismiss and Quash:*

Mobile was served with process in Indiana pursuant to Sec. 5-514, Ida. Code. It must be shown that it was either doing business in Idaho or committed some tortious act in Idaho.

This court is satisfied that Mobile was not "doing business" in Idaho. The "minimum contacts" requirement has not been met. In *Grobark v. Addo Machine Co.,* 158 N.E. 2d 73 (Ill. 1959), the court, construing *Hanson v. Denckla,* 357 U.S. 235 (1958), observes that it "stands for the proposition that there are still important territorial limitations on a State's power of in personam jurisdiction." All of the transaction involved here in the sale and purchase of the mobile aerial tower took place either in Indiana or Ohio. Insofar as "doing business" is concerned, *B. B. P. Association, Inc. v. Cessna Aircraft Co.,* 91 Idaho 259, 420 P. 2d 134 (1966), is distinguishable.

Was an allegedly tortious act committed in Idaho when it knowingly placed these towers in the "stream of commerce"? The Idaho Supreme Court has rejected the dichotomy that the negligent act and the injury must both concur in Idaho. The injury alone is sufficient, *Doggett v. Electronics Corp. of America, etc.,* 93 Idaho 26, 28-29, 454 P. 2d 63 (1969), if there is at least one contact in Idaho. In *Doggett* there was a direct sale of the boiler by nonresidents to a purchaser-user in Idaho. That is not the case here. Mobile has done nothing purposefully to avail

"itself of the privilege of conducting activities within the forum state . . .". *Hanson v. Denckla, supra,* at p. 253.

B. *Motion for Summary Judgment:*

In spite of the favorable disposition of Mobile's motion to quash service, this court feels compelled to rule on the merits of the motion for summary judgment.

All of the facts set forth elsewhere in this memorandum apply to this motion and compel the same result. Only one additional theory of liability requires some attention. Plaintiffs rely on strict liability in tort as against Mobile. Idaho has adopted Sec. 402A of the Restatement.

In pursuit of this theory plaintiffs cite to the court and strenuously rely upon *Jasper, Admin., v. Skyhook Corporation, etc.,* 547 P. 2d 1140 (N. Mex. 1976), among others of a similar nature.

The rig involved in *Jasper* was a 100′ telescopic crane operated from a cab on the ground—not by an operator in a bucket at the end of the boom. The boom had no "insulating link" or proximity warning device. Here there was an "insulating link" in the form of a fiberglass (nonconductor) bucket. Brown, a helper for the crane operator, who had no control of the situation, was electrocuted when the boom came in contact with high voltage lines. The deceased helper was standing on the ground.

The New Mexico court holds that before defendant can make out a valid defense as a matter of law, he must show that (1) decedent discovered the omission of the safety device; (2) he was aware of the danger, and (3) neverthe-

less, he made such an unreasonable use of the crane that it proximately caused his death. Here Quedens knew of the purpose of the "insulating link" and the absence of a proximity warning device. Most certainly beyond any doubt, he was fully aware of the danger of operating it in close proximity to high voltage lines. He nevertheless put himself in a totally unreasonable (if not unbelievable) position between two closely-spaced high voltage lines. In short, Quedens, unlike Brown in *Jasper,* voluntarily and unreasonably proceeded to a face-to-face confrontation with danger. There are other distinctions, but those noted suffice.

V.

PROXIMATE CAUSE AND CONCLUSION

Each legal theory relied upon by plaintiffs for liability as to each defendant has one common denominator in the essential elements—proximate cause.

The conduct of Quedens, when one views his actual prior and then knowledge of all of the general and specific circumstances, his experience in the business, the safety training sessions of his employer, and the oral and written warnings actually known and given, takes on the appearance of an act of virtual self-destruction for which the defendants are not liable under any reasonable view of the facts and the applicable law.

Quedens cannot be heard to say that he did not see what was plainly visible and obvious, especially when he had actual prior knowledge of the location of the lines

and the inherent dangers. *Ninio v. Hight,* 385 F. 2d 350 (10th Cir. 1967).

The actual and sole cause was the imprudence of Quedens. He alone made it a dangerous place to work.

IT IS ORDERED HEREBY that each of the motions for summary judgment are GRANTED and this action by plaintiffs is DISMISSED WITH PREJUDICE.

IT IS FURTHER ORDERED HEREBY that the motion of defendant Mobile Aerial Towers, Inc. to dismiss and to quash is GRANTED.

Judgment will be entered forthwith and defendants are awarded their costs.

DATED this 13th day of August, 1976.

/s/ J. Blaine Anderson
J. Blaine Anderson
United States Circuit Judge
Sitting by Designation

Appendix C

In the United States District Court for the District of Idaho

Civil No. 2-75-19

Joan F. Helm, Individually and as Guardian ad Litem for David William Quedens, an incapacitated person,

Plaintiff,

Davey Tree Expert Company, a foreign corporation, and Aetna Casualty & Surety Co., a foreign corporation,

Plaintiff-Intervenors,

vs.

Pacific Power and Light Company, a Maine corporation; Mobile Aerial Towers, Inc., an Indiana corporation; and The Idaho First National Bank, a National Association,

Defendants.

[Filed August 13, 1976]

JUDGMENT OF DISMISSAL

The summary judgment motions of the defendants were heard on June 1, 1976, following which the parties were given additional time to submit supporting authority. All counsel for the parties were present and the court heard arguments with respect to the motions. Based upon the mo-

tions for summary judgment, the answers to interrogatories, depositions, affidavits, exhibits and the pleadings and the other documents on file herein, the court has this date entered a Memorandum Decision and Order and concludes therein that there are no genuine and material issues of fact remaining for determination and that defendants, The Idaho First National Bank, Pacific Power and Light Company and Mobile Aerial Towers, Inc., are entitled to judgment as a matter of law.

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the action of the plaintiffs and plaintiffs in intervention as against the said defendants be, and the same is hereby, DISMISSED WITH PREJUDICE. Defendants shall recover their costs in the sum of $305.25 Ida. 1st Nat'l Bank, $706.70 Pacific Power & Light

DATED this 13th day of August, 1976.

/s/ J. Blaine Anderson
J. BLAINE ANDERSON
United States Circuit Judge
Sitting by Designation

Appendix C

In the United States District Court for the District of Idaho

Civil No. 2-75-19

Joan F. Helm, Individually and as Guardian ad Litem for David William Quedens, an incapacitated person,
Plaintiff,

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Pacific Power and Light Company, a Maine corporation; Mobile Aerial Towers, Inc., an Indiana corporation; and The Idaho First National Bank, a National Association,
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DATED this 13th day of August, 1976.

/s/ J. Blaine Anderson
J. BLAINE ANDERSON
United States Circuit Judge
Sitting by Designation

Appendix D

United States Court of Appeals
for the Ninth Circuit

Joan E. Helm, individually & as Guardian ad Litem for David William Quedens, an incapacitated person, Plaintiff-Appellant vs. Pacific Power and Light Co., a Maine corp., Mobile Aerial Towers, Inc., an Indiana corp., and The Idaho First National Bank, a National Assoc., Defendants-Appellees Davey Tree Expert Co., a foreign corp. and Aetna Casualty & Surety Co., a foreign corp., Plaintiff-Intervenors	No. 77-1352
Joan E. Helm, etc., Plaintiff-Appellant vs. Pacific Power & Light Co., etc., et al., Defendants-Appellees Davey Tree Expert Co., etc., et al., Plaintiff-Intervenors	No. 77-1353

[Filed February 26, 1979]

ORDER DENYING REHEARING
BEFORE THE PANEL

Before: VAN DUSEN,* WRIGHT and GOODWIN, Circuit Judges.

*Senior Circuit Judge for the Third Circuit.

The petition for rehearing is denied.

Because of (a) the many misstatements of the record[1] and (b) the misstatements of this court's November 30, 1978, Memorandum in the Petition for Rehearing filed January 8, 1979, as a result of this court's generous grant to plaintiff of over twice the amount of time for filing such a Petition provded in F. R. A. P. 40(a), namely 39 days from November 30, 1978, to January 8, 1979, this supplemental language in answer to the Petition is being included in this order:

I. Point IV of the Petition for Rehearing contends that this court failed to determine what law would most likely

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[1]Examples of such misstatements are:

A. At paragraph 1 on page 2 of the Petition, plaintiff states:

"The witness Boyle wondered in one of his statements whether David actually knew his bucket was between the wires."

Again, paragraph 1 on page 4 of the Petition contains this misleading quotation of one sentence of Boyle's deposition:

"On page 6, line 2, this Court states that according to witness Boyle's statements David was aware of the wires. In actuality, in this respect, Boyle stated as follows:

'I was standing watching and when I seen him stop under the wires, I watched him raise and I was wondering to myself if he had seen the wires.'"

Following the above quoted statement from Boyle's deposition of July 18, 1973, Boyle stated:

"Q. Did he look up at any time, could you see him look up at the wires at any time?

"A. The first time he stopped raising he looked around and I could not say whether he looked up or not but when he was up in the wires he was facing right down the wires, *looking right down the wires when he hollered at his partner so he must have seen them.*"

(Emphasis supplied.)

Moreover, the statement quoted in the Petition refers to Quedens' movements in going up between the wires; the above question and answer refers to when Quedens was already between the wires and looking down at them.

be applied by the state in question were it called upon at the time in question to determine whether or not a particular doctrine of law should or should not be applied. However, the decision of the district judge as to the state laws governing any diversity case is entitled to great weight. This court in *Hunt v. Sun Valley Co., Inc.,* 561 F.2d 744 (9th Cir. 1977), stated that "[w]e accord substantial deference to a district court in its defining and applying the law of the state in which the court is sitting in diversity cases." This determination "'will be accepted on review *unless shown to be clearly wrong.*'" *C. R. Fedrick, Inc. v. Borg-Warner Corp.,* 552 F.2d 852, 856 (9th Cir. 1977). By citing specific cases on the issues of law presented by the record (746a-750a), the district court made clear its view as to the

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B. The Petition, at the top of page 2, inaccurately states that "the District Judge . . . [concluded] that David Quedens' act was an act of self-destruction." The exact language of the District Judge was:

"The conduct of Quedens, when one views his actual prior and then knowledge of all of the general and specific circumstances, his experience in the business, the safety training sessions of his employer, and the oral and written warnings actually known and given, *takes on the appearance of an act of virtual self-destruction. . . .*"

(Emphasis supplied.)

Helm, etc., et al. v. Pacific Power & Light Co., et al., Aug. 13, 1976 (D. Idaho, Civil 2-75-19), at R. 749.

C. At paragraph 2 on page 4, the Petition states: "Nowhere is there any statement that would indicate that David was given 'written warnings' by anyone, and the District Court's reference to such is unsupported by the evidence; . . . ." Contrary to such assertion, the record contains evidence that there was a decal on the truck warning against contact with live wires. See Deposition of John Marria at 44:25-45:14. There was also evidence of such warnings in a manual which Quedens directed his subordinate Sharpe to read and which was in the truck.

D. With reference to the statement in paragraph 2 on page 2 of the Petition that Boyle stated "that while lowering his hands David may have grabbed for the bucket," the actual statement of Boyle was:

applicable state law and, after careful consideration, we are unable to say that it was "clearly wrong."

Subsequent to the filing of all briefs, oral argument and the delayed Petition for Rehearing described above, plaintiff filed on January 16, 1979, a letter calling the court's attention to two Idaho Supreme Court cases, using the language that "temporary forgetfulness, inattention or distraction do not generally constitute contributory negligence." *Denton v. City of Twin Falls,* 54 Idaho 35, 28 P.2d 202 (1933); *Butland v. City of Caldwell,* 51 Idaho 483, 6 P.2d 493 (1931). These cases involved elderly plaintiffs falling on defective sidewalks and other circumstances far different from those involved in this case. Counsel for

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"A. Yes, he made some kind of a motion while he was hollering, when he hollered at his partner and from where I was standing it looked like he kind of held both hands out to his side, straight out, and then just dropped them.

"Q. What did it look like he was trying to do when he dropped his hands?

"A. *I really don't know what he was trying to do.* It was so quick that . . .

"Q. Did it look *like he perhaps wanted to grab the side of the bucket?*

"A. It *could* be. He *might have been* dropping his one hand to reach for the controls.

"Q. At what point do you think he got into the wires with his hands?

"A. He made contact almost immediately as he dropped them"

(Emphasis supplied.)

There was no evidence that plaintiff had lost his balance or for any reason was trying to steady his position by reaching for the sides of the bucket.

E. At paragraphs 11 and 12 on pages 2-3 of the Petition, the plaintiff makes reference to Beamer's experiment. The results of this experiment are not a part of the record, as pointed out on pages 10-11 of this court's November 30, 1978, Memorandum, because they were filed subsequent to the district court judgment of August 13, 1976.

plaintiff failed to call our attention to the more recent decision of the Supreme Court of Idaho in *Pearson v. City of Weiser,* 206 P.2d 263 (Idaho 1949), where the court cited the above *Butland* case but pointed out that the court did not approve

> ". . . an instruction that one may forget or be inattentive or indifferent to a known danger sufficient to produce injury and at the same time be driving his motor vehicle in the manner of an ordinarily prudent and careful man.
>
> ". . . This case is to be distinguished from those where there were no circumstances tending to distract or divert attention."[2]

206 P.2d at 270.

Furthermore, the basis for the district court's decision in this case emphasized the lack of fault of the defendants on this record, as opposed to any contributory negligence of plaintiff. We note the discussion of the Bank's liability at 746a of the record and the discussion of the Power Company's liability at 747a of the record. In regard to the manufacturer's liability, we note the following language of the district court:

> "No defect in the boom, the bucket or its mounting or control apparatus has been asserted or shown. All of the evidence is that it was in good condition and operating normally and smoothly. The manufacturer, Mobile, does not install electro-alarms or proximity warning devices on the boom or bucket. Plaintiffs sup-

---

[2]The only circumstances tending to distract or divert the attention of Quedens was caused by him, since the testimony of Boyle made clear that Quedens started the conversation with Sharpe immediately prior to his contact with the wires. See page 20 of Boyle's deposition of 8/11/75.

> plied no evidence that it is feasible to do so, or is required by any code, regulation or industry safety standard. There is some evidence that they are available, but are used only on other types of equipment working in close proximity to high voltage power lines, i.e., long ground-operated booms and cranes."

Record at 745. Moreover, the court determined that it had no jurisdiction over Mobile on the facts of this record and under the applicable laws. See text at V of November 30, 1978, Memorandum.

II. Point V of the Petition contends that this court misinterpreted § 302A of the Restatement of Torts Second. Contrary to the plaintiff's contention, § 302A will not support recovery. This doctrine is based on an initial negligent or inattentive act of a person other than the injured plaintiff, the result of which causes the injury to an inattentive or negligent plaintiff. There is no evidence on the record that the Power Company was negligent. Moreover, Quedens' actions go beyond mere inattentiveness and border on intentional and deliberate conduct.

III. Point VIII of the Petition contends that this court has misinterpreted the purpose of §§ 416 and 427 of the Restatement of Torts Second. These sections of the Restatement have not been misread and do not support recovery by the plaintiff. A reading of these sections makes it clear that an employer of an independent contractor is liable for harm caused to others *as a result of a failure of the independent contractor to exercise reasonable care.* See the Introductory Note to § 416 of the Restatement.

There has been no record proof that Davey Co. failed to exercise reasonable care.

For the foregoing reasons, as well as those stated in the November 30, 1978, Memorandum, the Petition for Rehearing addressed to the panel is being denied.

Supreme Court, U. S.
FILED
JUL 10 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1979

No. 78-1759

JOAN E. HELM, individually and as Guardian ad Litem for DAVID WILLIAM QUEDENS, an Incapacitated Person,

Petitioner,

vs.

PACIFIC POWER AND LIGHT CO., a Maine corporation, MOBILE AERIAL TOWERS, INC., an Indiana corporation and THE IDAHO FIRST NATIONAL BANK, a National Association,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondent, Pacific Power and Light Company, a Maine corporation, respectfully urges this Court to deny the Petition for Writ of Certiorari.

QUESTION PRESENTED

Whether, as respects the Pacific Power and Light Company, any reason whatsoever exists for the United States Supreme Court to review the decision of the United States Court of Appeals for the Ninth Circuit.

STATEMENT OF THE CASE

On July 13, 1973, David Quedens, represented here-

in by his mother and guardian ad litem, the petitioner John E. Helm, was severely injured when he simultaneously touched uninsulated high voltage power wires while performing tree-trimming work. At the time and place of the accident, David Quedens was employed by Davey Tree Expert Company (Davey Tree) and was performing work pursuant to a contract between Davey Tree and the Idaho First National Bank (the bank). The contract called for Davey Tree to trim trees on and adjacent to a vacant lot on which the bank was to construct a new branch office. (R. 398,414)

Quedens had been employed previously by Davey Tree between May and September, 1971, as a tree trimmer, and also had prior experience as a tree trimmer in California. (R. 96:19) During his employment with Davey Tree in 1971, Quedens was a member of a tree trimming crew whose exclusive function was to trim trees along utility power lines. Weekly safety meetings for the benefit of the crew members were conducted and it was stressed in these meetings that the mobile boom and bucket used in the work should never be positioned closer than 6 feet from any power lines. (R. 597-99) After two years of service in the military, Mr. Quedens returned to Davey Tree in March, 1973 and worked as a foreman.

The agreement between the bank and Davey Tree was in the form of an acceptance of a bid submitted by Davey Tree. The bid was prepared by Mr. James Marria, then a sales representative for Davey Tree, in the latter part of June, 1973. In order to bid the job, Mr. Marria and Mr. Quedens traveled to Sandpoint, Idaho to view the site. Quedens' attention was called specifically to the three power lines over and above the trees to be trimmed and he was reminded not to get the boom and bucket closer than 6 feet to the power lines. (R. 597-99)

Much of the trimming was to be done from a bucket which was at the end of a hydraulically extended mobile power and mounted on a truck and manufactured by Mobile Aerial Towers, Inc. Several decals warning of the dangers of high voltage power lines were conspicuously located on the boom assembly and inside the cab of the truck used by Quedens at the time of the accident. (Marria depo. 44, 45: 15-25, 83:21, Exhibit 6). These warnings were easily observable at the time of the accident. (Sharp depo. 93:23-25)

On the day of the accident, Quedens was trimming trees from the bucket. The bucket had controls to operate the boom. There was also a control panel in the truck to lower the boom in case of emergency. Quedens had trimmed two sides of the trees from the inside and had then moved the truck to the adjoining street, approximately 15 feet from the tree he was about to trim. (Sharp depo. 56:9, 59:13, 101)

The power lines in question were owned, operated and maintained by Pacific Power and Light Co. A

three wire set ran north and south above the trees being trimmed. Another three wire set, called a tap line, ran perpendicularly across the street from a cafe and intersected the line running north and south. The height of the tap line was 39 feet above street level. (R. 415-17)

Late in the afternoon, following an exchange of tools between the two men, Quedens positioned the bucket over the street to the rear of the truck. (Boyle Depo. 9:15, 12:11) Quedens then raised the boom to a height which resulted in the bucket being positioned approximately 1 foot below and between two wires of the three wire tap line. The wires passed on both sides of Queden at approximately the level of his waist. (Sharp depo. 63:6, Boyle Depo. 23:22-24:3) Quedens raised his hands and arms above the wires and appeared to be shouting or talking to Sharp on the ground. Quedens was looking right down the wires when he yelled at his partner and must have seen them. (See footnote 1 to the Order Denying Petition for Rehearing, Appendix D.) Quedens then suddenly dropped his arms to both sides and both hands touched the wires, resulting in the injuries sustained. At the time of the contact the bucket was positioned over the street and 15-20 feet away from the closest limb. (Boyle depo. pages 66-67); Sharp Depo. page 59:22-24) The photographic exhibits admitted at the hearing on the summary judgment motions clearly depict that the power lines ran some distance above the tops of the trees.

Petitioner brought suit against defendants Pacific Power and Light Co., Mobile Aerial Towers, Inc. and the Idaho First National Bank in the United States District Court for the District of Idaho. Upon motions by the defendants for summary judgment, oral argument was presented to the District Court. After careful consideration, the District Court granted the motions and entered judgment for all defendants. The petitioner filed a notice of appeal to the United States Court of Appeals for the Ninth Circuit and also filed a Federal Rules of Civil Procedure 60(B) motion to the District Court, which was denied. On November 30, 1978, the United States Court of Appeals for the Ninth Circuit entered its memorandum opinion affirming the District Court's judgment in all respects. Petitioner filed a petition for rehearing on January 8, 1979, and on February 26, 1979, the United States Court of Appeals for the Ninth Circuit denied the petition. The District Court Memorandum Decision and Order and the Court of Appeals Memorandum Decision and its Order Denying the Petition for Rehearing have been set forth in the Appendix to the Petition for Writ of Certiorari.

REASONS FOR DENYING PETITION

It is recognized in the Supreme Court rules by Rule 19 that a review on Writ of Certiorari is not a matter

of right, but of sound judicial discretion and will only by granted where there are "special and important reasons thereof." There are enumerated certain reasons which by indication of character emphasize the type of issues which may be examined. Conflicts of decisions between courts of appeal, conflicts between courts of appeal and applicable decisions of the Supreme Court and/or a decision on an important federal question which should be settled by the Supreme Court, are all examples of "special and important reasons" for exercise of the judicial discretion of certiorari.

The instant petition for Writ of Certiorari fails to comply with Supreme Court Rules 19 and 23. Additionally petitioner's italicized argument that the decisions of the District Court judge and the Ninth Circuit Court of Appeals: ' . . . make a mockery of justice . . .' (Petitioner's Brief page 27) runs the risk of violation of Supreme Court Rule 40 in being a scandalous allegation which should only merit it being immediately stricken by the Court.

The District Court and the Court of Appeals have twice reviewed the petitioner's arguments and have in each instance found no question of material fact existent on any relevant issue. In such circumstances on motion for summary judgment there is, of course, no right to jury trial.

At very best petitioner indicates only an issue of

importance between the parties and of no real importance to the public. Such a contention consistently fails to merit the granting of a writ of certiorari. *Rice v. Sioux City Memorial Park Cemetery, Inc.*, (Iowa, 1955) 75 S.Ct. 614, 349 U.S. 70, 99 L.Ed. 897. Indeed petitioner has totally failed to cite one credible "special and important reason" for granting review of Writ of Certiorari.

The District Court on two occasions and then the Ninth Circuit Court of Appeals on two occasions found ample support for Pacific Power and Light Company's motion for summary judgment in the decision of *Probart v. Idaho Power Company*, 74 Idaho 119, 258 P.2d 361 (1953). Petitioner makes no assertion that *Probart* in any way decides an important federal question, reflects a conflict between state and federal law, or that reliance upon it creates a conflict between the Circuits. Instead petitioner urges, for at least the fifth time, that the case is distinguishable. This argument has continually been found lacking merit in legal analysis and support in fact. Although power companies have the highest duty of care, *Probart*, *supra*, they are not insurers of those working near such transmission lines nor are they required to anticipate or foresee the remotest possibilities. *Clough v. New England Tel. & Tel. Co.*, 172 N.E. 2d 113 (Mass. 1961); *Manaia v. Potomac Electric Power Co.*, 268 F.2d 793 (4th Cir. 1959), cert. den., 80 S.Ct. 255.

CONCLUSION

When there is no genuine issue as to any material fact the moving party is entitled to a judgment as a matter of law. As to respondent Pacific Power and Light, the facts and law presented to both the District Court and Ninth Circuit Court of Appeals warranted dismissal of the complaint by summary judgment. Furthermore, the petition has totally failed to meet the criteria or considerations governing a review on certiorari.

We respectfully pray that the petition be denied.

DATED: July 5, 1979.

CUTLER W. HALVERSON
Counsel for Pacific Power and Light Co., Respondent

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 78-1759

JOAN E. HELM, individually and as Guardian ad Litem for DAVID WILLIAM QUEDENS, an Incapacitated Person,

Petitioner,

vs.

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Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 78-1759

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Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondent, Mobile Aerial Towers, Inc. an Indiana corporation, respectfully urges this court to deny the Petition for Writ of Certiorari.

QUESTION PRESENTED

Whether, as respects Mobile Aerial Towers, Inc., any reason whatsoever exists for the United States Supreme Court to review the decision of the United States Court of Appeals for the Ninth Circuit, which decision affirmed the Federal District Court's dismissal of the complaint for lack of in personam jurisdiction, and/or, alternatively, the granting of summary judgment to Mobile Aerial Towers, Inc.

STATEMENT OF THE CASE

The following supplements the statement of the case presented by Plaintiff-Petitioner in her petition for writ of certiorari.

The product which forms the subject matter of this litigation as respects Mobile Aerial Towers is a "High Ranger". The High Ranger is a hydraulically operated boom and bucket system, mounted on a turn table on the bed of a truck. The boom and bucket are mobile, and may be raised, lowered, or moved laterally by an operator actuating the controls from within the bucket, or by a worker on the ground acuating the controls located on the truck bed.

David Queden's employer, Davey Tree Expert Company, purchased the High Ranger unit from its home office in Kent, Ohio, from Mobile Aerial Towers, which is located in Indiana. (Maria depo., 51: 18-22). As was noted by the District Judge herein, "all of the transactions involved here in the sale and purchase of the mobile aerial tower took place either in Indiana or Ohio." (Appendix to Petition for Writ of Certioria, p. B-8).

David Quedens (hereinafter David) held a variety of jobs for short periods prior to his injury on July 13, 1973. It is significant that among his jobs he was a tree trimmer with Asplundh Tree Expert Company, Concord, California, during 1970 and 1971, and that in 1971, he moved to Boise, Idaho, where he was a tree trimmer for Davey Tree Expert Company (hereinafter Tree Co.) from May until September, 1971. David resumed employment with Tree Co. in March, 1973, and continued working there until his injury in July of 1973. (R. 96).

David was experienced in trimming trees, and in trimming trees around power lines. (Sharpe depo., 95: 7-23; Marria depo. 22: 14-18, 33: 23-34: 1, 50: 12-15).

When David worked for Tree Co. during 1971, his status was that of a tree trimmer, and he was part of a crew whose *exclusive function* was to trim trees along utility power

lines. (R. 597-599). During this period, David attended weekly "tail gate" meetings at which the foreman stressed various safety policies. One policy stressed was that the operator of a highrise boom and bucket should never position the bucket closer than six feet from a power line. David attended the meetings and was aware of this policy. (R. 597-599).

The Tree Co., in order to submit a bid for the tree trimming work which forms the subject matter of this litigation, sent David Quedens' supervisor, James Marria, to the job site. Knowing that David would be assigned to perform the work if the Tree Co.'s bid was accepted, Marria had David accompany him to the job site in Sandpoint, Idaho. Together they viewed the premises and discussed the trimming that would be required. During this discussion, Marria called David's attention to the location of the power lines near the trees that were to be trimmed and instructed David to be careful and not to get the bucket or the boom any closer than six feet from the power lines. (R. 597-599).

Upon acceptance of the bid by the Idaho First National Bank, David and his subordinate, Alex Sharpe, traveled to the job site from Boise, Idaho. (Sharpe's depo. 59: 21-22). Work commenced on or about July 6, 1973, and progressed satisfactorily until the afternoon of July 13, 1973. (Sharpe's depo. 46: 1-17).

On July 13, in the afternoon, David was operating the boom and bucket, and his partner, Sharpe, was on the ground. There was an exchange of tools between the two men. (Boyle depo. 9: 15-20). Thereafter, David raised the bucket six to eight feet off the ground, and hesitated for approximately ten seconds while sizing up the tree he was about to begin trimming. (Boyle depo. 12: 21-13:23). At this point, David's head was approximately eight to ten feet below the wires involved. (Boyle depo., 82: 2-7). David then raised the bucket straight up and directly between two of the three overhead wires. (Boyle depo., 13: 22-23). At this point, David was ten to fifteen feet from the tree he was about to begin trimming. There were no objects other than the three wires in David's vicinity. (Boyle depol, 17: 3-14). The wires

David was between were approximately three feet apart from one another. (Boyle depo., 16: 10-14). The portion of David's body from his waist up was above these wires. (Boyle depo., 53: 14-18).

David remained motionless for a few seconds while standing bewtween these wires which passed him at waist level. (Boyle depo., 20:12). He then raised his hands to the approximate level of his nose and hollered something to his partner on the ground. (Boyle depo., 22: 20-23:16). His hands were approximately one to one and one-half feet above the wires that passed on either side of him. (Boyle depo., 22:9-15). They remained in this raised position for fifteen to twenty seconds while David was hollering groundward. (Boyle depo., 23:17-24:9). David then dropped his hands and each contacted, simultaneously, the wires that passed within inches of his body, causing electrocution. (Boyle depo., 20:12-21:10, 22:20-23:5). Sharpe hollered as he saw David being electrocuted, jumped on the back of the truck and lowered the boom and bucket by using the controls located on the turntable, which was mounted on the back of the truck. (Boyle depo., 36:12-37:16).

In addition to safety meetings held by David's employer at which the dangers inherent in trimming trees close to power lines were stressed, as was the unconditional policy of David's employer that employees maintain at least six feet between power lines and any part of the boom and bucket assembly at all times, David received relevant safety instruction from the warning decals affixed to the truck, boom, and bucket assembly, as well as from the Accident Prevention Manual and the Operating Instructions which were supplied with each High Ranger unit. (Marria depo., 31:21-32:8, 38:10-22, 43:6-44:14, 50:21-51:1, 93:2-8, 93:11-94:19, depo. Ex. 8, p.p. 44-46, depo. Ex. 2, p.p. 9-10; R. 597-599; Sharpe depo., 37:15-19).

Without setting forth verbatim the express warnings contained in the warning decals, Accident Prevention Manual, and Operating Instructions supplied with the High Ranger unit, suffice it to say that the above-referred to

warnings expressly warned that the High Ranger unit offered absolutely no electrical protection from operator contact with two energized wires.

With respect to the operability of the subject High Ranger unit, there is no question but that the product operated as it was designed to operate at all times material to this litigation. (Boyle depo., 85:8-25, 110:10-19, 28:11-18, 36:18-37:25, 118:4-12; Sharpe depo., 65:2-22, 131:7-25, 113:11-16, 114:2-8, 112:17, 115:13-116:17; Marria depo., 59:3-16).

The subject High Ranger unit incorporates an elaborate insulation system which is capable of withstanding 30,000 volts AC through any part of the bucket wall. Additionally, the upper boom assembly is constructed of fiberglass, and thus protects anyone in contact with the truck from being electrocuted should the upper boom assembly contact an energized wire. (Marria depo., Ex. 1, pp. 31-33(a)). Of course, such insulation and equipment cannot protect an individual from electrocution caused by accidental or deliberate simultaneous contact between two energized wires. (Marria depo., Ex. 2, p. 10).

The record establishes that Mobile Aerial Towers had no knowledge of any proximity warning device which could be successfully incorporated into an insulated aerial boom and/or bucket unit. (R. 500). Moreover, there is no evidence in the record which demonstrates that a proximity warning device is or was available or feasible for use on Mobile Aerial Tower's High Ranger unit, or that it was requested for use on Mobile Aerial Tower's product by David Queden's employer in its specifications. (Appendix to petition for Writ of Certiorari, p. B-4—B-5). Similarly, a co-employee of Mr. Quedens who had been in the tree trimming business for thirty-seven years as a trimmer, foreman, supervisor, and sales representative, testified that he had never seen a proximity warning device in any equipment used in tree trimming operations. (Marria depo., 46:1-3, 79:19-80:6).

REASONS FOR DENYING PETITION

As noted by the Respondent, The Idaho First National Bank, petitioner's Petition constitutes little more than rhetorical comment. Both the District Court and the Court of Appeals were twice asked to review the record to determine whether dismissal of the complaint and/or summary adjudication was appropriate, or whether there existed material issues of fact. On all four occasions, of course, both the District Court and the Court of Appeals concluded that, under the applicable law of the State of Idaho, no material issue of fact existed. The Court of Appeals, in its Order Denying Plaintiff-Appellant a re-hearing on this matter noted that it was constrained to supplement its Order denying the Petition for Rehearing because of the many misstatements made by the petitioner in her petition for re-hearing of both the record and the Court of Appeals' Memorandum Decision, which decision affirmed the District Court's holdings. (Appendix D to Petition for Writ of Certiorari, p. D-2). Incredibly, petitioner has chosen to make the same misstatements in its Petition for Writ of Certiorari to this Court.

There is no dispute that Idaho substantive law governs. *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). Petitioner complains that the District Court and the Court of Appeals have misinterpreted Idaho law and that dismissal of the complaint and/or summary adjudication of this matter, as respects Mobile Aerial Towers, is therefore inappropriate.

Notwithstanding petitioner's contentions, the District Court found that the substantive law of the State of Idaho was contrary to the state of the law petitioner advocated, and that under the substantive law of the State of Idaho, dismissal and/or summary adjudication was proper because (1) Mobile Aerial Towers had not subjected itself to personal jurisdiction within the State of Idaho, and (2) the condition of Mobile Aerial Towers' product did not, as a matter of law, proximately cause injury to David Quedens.

The Court of Appeals reviewed the decision of the District Court, and concurred in the District Court's

finding that, under the facts of record viewed in the light most favorable to the petitioner, and under the law of the State of Idaho, dismissal of the complaint and/or summary adjudication was appropriate since the record showed that no personal jurisdiction existed over Mobile Aerial Towers, and that the condition of the product did not proximately cause injury to David Quedens.

Notwithstanding the findings of the lower courts, petitioner asks this Court to condemn the substantive law relied upon by Mobile Aerial Towers, and adopt the substantive law relied upon by the petitioner. It is a well recognized principle that the United States Supreme Court will give great deference to the determinations of the local federal judges with respect to local law, since such judges are familiar with the intricacies and trends of local law and practice. Thus, the United States Supreme Court does not, generally, examine the local law as applied by the lower courts. *Commissioner v. Estate of Bosch*, 387 U.S. 456 (1967); *Skelly Oil v. Phillips Petroleum Company*, 339 U.S. 667 (1950); *Hillsborough Twp. v. Cromwell*, 326 U.S. 620 (1945).

In short, the arguments presently before the Supreme Court have been made before by petitioner. The lower courts, on four occasions, rejected petitioner's arguments. The substantive law of the State of Idaho is contra to that advocated by petitioner. Application of Idaho substantive law to the factual record mandated dismissal of the Complaint against Mobile Aerial Towers, and/or Summary Judgment in favor of Mobile Aerial Towers, notwithstanding petitioner's attempts to misconstrue the factual circumstances in an attempt to create a material issue of fact.

CONCLUSION

It is respectfully requested that the Petition for Writ of Certiorari be denied.

Respectfully submitted this _____ day of _____ , 1979.

GALIHER, CLARK, MARTELL & DONNELLY

By _____
Frank J. Martell, Of the Firm for Respondent
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Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

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Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether, as respects the Idaho First National Bank, any reason whatsoever exists for the United States Supreme Court to review the decision of the United States Court of Appeals for the Ninth Circuit.

STATEMENT OF THE CASE

On July 13, 1973, David Quedens, represented herein by his mother and guardian ad litum, the petitioner Joan E. Helm, was severely injured when he simultaneously touched uninsulated high voltage power wires while performing tree-trimming work. At the time and place of the accident, David Quedens was employed by Davey Tree Expert Company (Davey Tree) and was

performing work pursuant to a contract between Davey Tree and the Idaho First National Bank (the bank). The contract called for Davey Tree to trim trees on and adjacent to a vacant lot on which the bank was to construct a new branch office. (R. 398,414)

Quedens had been employed previously by Davey Tree between May and September, 1971, as a tree trimmer, and also had prior experience as a tree trimmer in California. (R.96:19) During his employment with Davey Tree in 1971, Quedens was a member of a tree trimming crew whose exclusive function was to trim trees along utility power lines. Weekly safety meetings for the benefit of the crew members were conducted and it was stressed in these meetings that the mobile boom and bucket used in the work should never be positioned closer than 6 feet from any power lines. (R 597-99) After two years of service in the military, Mr. Quedens returned to Davey Tree in March, 1973 and worked as a foreman.

The agreement between the bank and Davey Tree was in the form of an acceptance of a bid submitted by Davey Tree. The bid was prepared by Mr. James Marria, then a sales representative for Davey Tree, in the latter part of June, 1973. In order to bid the job, Mr. Marria and Mr. Quedens traveled to Sandpoint, Idaho to view the site. Quedens' attention was called specifically to the three power lines over and above the trees to be trimmed and he was reminded not to get the boom and bucket closer than 6 feet to the power lines. (R 597-99)

Much of the trimming was to be done from a bucket which was at the end of a hydraulically extended mobile tower unit mounted on a truck and manufactured by Mobile Aerial Towers, Inc. Several decals warning of the dangers of high voltage power lines were conspicuously located on the boom assembly and inside the cab of the truck used by Queden at the time of the accident. (Marria depo. 44,45:15-25, 83:21, Exhibit 6). These warnings were easily observable at the time of the accident. (Sharp depo. 93:23-25)

The trees being trimmed were not on the bank's property. They were located adjacent to the property between the sidewalk which bordered the vacant lot and the public street. The bank's property line ran to the inside of the sidewalk. (R. 353) The trees were to be trimmed pursuant to the bank's request and the agreement, but the bank was under no legal obligation to do so, as the City of Sandpoint had exclusive control over the trees located outside private property lines. (R. 353)

On the day of the accident, Quedens was trimming trees from the bucket. The bucket had controls to operate the boom. There was also a control panel in the truck to lower the boom in case of emergency. Quedens had trimmed two sides of the trees from the inside and had then moved the truck to the adjoining street, approximately 15 feet from the tree he was about to trim. (Sharpe depo. 56:9, 59;13,101)

The power lines in question were owned, operated and maintained by Pacific Power and Light Co. A three wire set ran north and south above the trees being trimmed. Another three wire set, called a tap line, ran perpedicularly across the street from a cafe and intersected the line running north and south. The height of the tap line was 39 feet above street level. (R.415-17) Neither the three wire set nor the tap line served bank property. The lines were not over the bank's property, nor did the bank have any control over them. (R. 418, 464:29)

Late in the afternoon, following an exchange of tools between the two men, Quedens positioned the bucket over the street to the rear of the truck. (Boyle depo. 9:15, 12:11) Quedens then raised the boom to a height which resulted in the bucket being positioned approximately 1 foot below and between two wires of the three wire tap line. The wires passed on both sides of Queden at approximately the level of his waist. (Sharp depo. 63:6, Boyle Depo. 23:22-24:3) Quedens raised his hands and arms above the wires and appeared to be shouting or talking to Sharp on the ground. Quedens was looking right down the wires when he yelled at his partner and must have seen them. (See footnote 1 to the Order Denying Petition for Rehearing, Appendix D.) Quedens then suddenly dropped his arms to both sides and both hands touched the wires, resulting in the injuries sustained. At the time of the contact the bucket was positioned over the street and 15-20 feet away from the closest limb. (Boyle depo. pages 66-67); Sharp depo. page 59:22-24) The photographic exhibits admitted at the hearing on the summary judgment motions clearly depict that the power lines ran some distance above the tops of the trees.

Petitioner brought suit against defendants Pacific Power and Light Co., Mobile Aerial Towers, Inc. and the Idaho First National Bank in the United States District Court for the District of Idaho. Upon motions by the defendants for summary judgment, oral argument was presented to the District Court. After careful consideration, the District Court granted the motions and entered judgment for all defendants. The petitioner

filed a notice of appeal to the United States Court of Appeals for the Ninth Circuit and also filed a Federal Rules of Civil Procedure 60(B) motion to the District Court, which was denied. On November 30, 1978, the United States Court of Appeals for the Ninth Circuit entered its memorandum opinion affirming the District Court's judgment in all respects. Petitioner filed a petition for rehearing on January 8, 1979, and on February 26, 1979, the United States Court of Appeals for the Ninth Circuit denied the petition. The Court of Appeals Memorandum Decision and its Order Denying the Petition for Rehearing have been set forth in the Appendix to the Petition for Writ of Certiorari.

REASONS FOR DENYING PETITION

Petitioner has not set forth any reason whatsoever which could be seaid to be sufficient grounds for this court to issue its Writ of Certiorari to review the decision of the Ninth Circuit Court of Appeals. Instead, petitioner has chosen to engage in nothing more than jury rhetoric in an effort to sway this Court to issue its discretionary writ. Both the District Court and the Court of Appeals twice reviewed the record in response to Petitioner's argument that a question of material fact exists and neither court found any such issue. Petitioner's effort to now disguise her argument that a material question of fact does exist in terms of a denial of the right to a jury trial is nothing more than begging the question. Obviously, in civil cases, the right to jury trial is conditioned upon there being a material factual question to submit to the jury. No such question exists in this record.

Petitioner has not argued that the decision of the Ninth Circuit Court of Appeals is in conflict with the decision of another court of appeals on the same matter. Obviously, she cannot. As respects the Bank, petitioner does not argue that the United States Court of Appeals for the Ninth Circuit decided a state law question in conflict with applicable Idaho law. Again, she cannot. Incredibly, petitioner now chooses to label the decision of the District Court and the decision of the Court of Appeals as a mockery of justice. In its order denying the petition for rehearing, the United States Court of Appeals of the Ninth Circuit made a special effort to point out the petitioner's misstatements of the record and of the Courts November 30, 1978, opinion contained in her petition for rehearing. Petitioner again sets forth the same misstatements in her petition filed with this Court; the highest court of the United States. If there is any mockery of justice, the

bank would suggest that it is not by the District Court, the Court of Appeals or by the respondents, but by the petitioner.

As against the bank, petitioner argues that the District Court and Court of Appeals should have applied Sections 416 and 427 of the restatement (Second) of Torts. Both lower courts rightly rejected this argument. The referenced sections are inapposite to the instant action as there is no allegation or proof that the independent contractor, Davey Tree, was negligent. In order for those sections to apply there must be a showing that the independent contractor failed to exercise due care for which the employer of the independent contractor may be held vicariously liable. Petitioner does not, and cannot, site any Idaho Case Law which adopts the theory of these sections. Obviously, therefore, petitioner cannot argue that the District Court or the Court of Appeals failed to correctly apply Idaho law.

Furthermore, the few cases from other jurisdictions which have applied those sections, such as the case sited by petitioner, all involve situations where the employer of the independent contractor exercised some control over the area where the accident or injury occurred. Here, the bank did not own, maintain or control the power lines and the accident occurred in the public street.

Idaho law does provide that an independent contractor and his employees are invitees upon the owner-employer's premises. *Carr v. Wallace Laundry Company*, 170 Pac. 107 (Idaho, 1918). An owner of premises has no duty to warn of open and obvious dangers of which an invitee knows or should have known. *Otts v. Brough*, 409 P.2d 95 (Idaho, 1965); *Ramon v. Interstate Utilities Company*, 170 Pac. 83 (Idaho, 1917). There is no question the power lines were an open and obvious hazard. They were in plain view. There is no evidence that Mr. Quedens did not know or should not have known of their existence and the danger.

CONCLUSION

Under no set of circumstances could the bank have any liability to the petitioner. There is no genuine issue of any fact material to the motion for summary judgment which the District Court granted and the Court of Appeals affirmed. On the facts and the law the bank was entitled to a dismissal. We respectfully urge the Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

MOFFATT, THOMAS, BARRETT & BLANTON
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June 22, 1979

Supreme Court, U. S.
FILED
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 78-1759

JOAN E. HELM, individually and as Guardian ad Litem for DAVID WILLIAM QUEDENS, an Incapacitated Person,
Petitioner,

vs.

PACIFIC POWER AND LIGHT CO., a Maine corporation, MOBILE AERIAL TOWERS, INC., an Indiana corporation and THE IDAHO FIRST NATIONAL BANK, a National Association,
Defendants.

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Defendants.

PETITIONER'S REPLY BRIEF

I

RESPONDENTS PROCEDURAL OBJECTIONS ARE WITHOUT MERIT

Respondent, PACIFIC POWER AND LIGHT CO., at page 7 of its brief argues that this case involves an issue of importance only as to the parties and that it involves no issue of any real importance to the public. We submit that while this case of course is extremely important to the parties, that it is of equal importance to the public. It is difficult to conceive of an issue which is more important to the public than prohibiting trial courts from granting

summary judgments on non-existent evidence such as was done in this case, or in granting summary judgments where there are material and substantial issues of fact which should be tried by the jury rather than on affidavit, such as once again was done in this case. Our State Appellate Courts, with the *regularity of clock work,* have found it necessary to reverse summary judgments and to remind trial courts that litigants have a constitutional right to their day in court on disputed issues of fact and that trial courts should not attempt to decide cases on the basis of disputed evidence contained in affidavits.

Proof of the fact that this court also shares this same view and that it considers a litigant to have a constitutional right to a jury trial, where there are important issues of disputed facts involved, is the fact that on numerous occasions this Court has granted reversals in cases involving summary judgments where as between the parties the issues primarily concerned them. Some of the numerous cases in which reversals of such summary judgment were granted by this Court are as follows: *Adickes v. S. H. Kress & Co.* (1969) 398 U.S. 144; *Sartor v. Arkansas Natural Gas Corp.* (1944) 321 U.S. 620; *Poller v. Columbia Broadcasting System, Inc.* (1961) 368 U.S. 464; *United States v. Diebold, Inc.* (1961) 369 U.S. 654; *Carter v. Stanton* (1972) 405 U.S. 669; and *Dombrowski v. Eastland* (1966) 387 U.S. 82.

There are also numerous other cases where this Court has reversed the actions of trial courts in granting nonsuits, directed verdicts, and in giving jury instructions where there are disputed issues of fact which required the

jury's determination and where the issues should not have been decided by the court. Many of these cases involved disputes between private citizens as to their respective rights and yet this Court felt it so important that litigants not be deprived of their constitutional right to a jury trial that *certiorari* was granted. For some of these cases see *Halliday v. United States* (1941) 315 U.S. 94; *Spring Co. v. Edgar* (1878) 99 U.S. 645; *Head v. Hargrave* (1881) 105 U.S. 45; and *Sonnentheil v. Christian Morelein Brewing Co.* (1898) 172 U.S. 401.

In *Poller v. Columbia Broadcasting, supra,* this Court set forth the following principles with reference to the granting of summary judgments:

> "Summary judgment should be entered only when the pleadings, depositions, affidavits, and admissions filed in the case 'show that [except as to the amount of damages] there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' Rule 56(c), Fed. Rules Civ. Proc. This rule authorizes summary judgment 'only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, . . . [and where] no genuine issue remains for trial . . . [for] the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try.' *Sartor v. Arkansas Natural Gas Corp.* 321 U.S. 620, 627 (1944)"

In *United States v. Diebold, supra,* this Court states in reversing a summary judgment as follows:

> "On summary judgment, the inferences to be drawn from the underlying facts contained in such materials *must be viewed* in the light most favorable to the

party opposing the motion. A study of the record in this light leads us to believe that inferences contrary to those drawn by the trial court might be permissible. The materials before the District Court having thus raised a genuine issue as to ultimate facts material to the rule of *International Shoe Co. v. Federal Trade Comm'n,* it was improper for the District Court to decide the applicability of the rule on a motion for summary judgment."

In effecting reversal in *Sartor v. Arkansas Natural Gas Corp., supra,* this Court, at page 627, states as follows:

"The Court of Appeals below heretofore has correctly noted that Rule 56 authorizes summary judgment only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, that no genuine issue remains for trial and that the purpose of the rule is not to cut litigants off from their right to trial by jury if they really have issues to try. *American Insurance Co. v. Gentile Brothers Co.,* 109 F.2d. 732; *Whitaker v. Coleman,* 115 F.2d. 305. In the very proper endeavor to terminate a litigation before it for the fourth time, we think it overlooked considerations which make the summary judgment an inappropriate means to that very desirable end."

In the instant case, the court below, without any question, has violated each and every one of these familiar rules applicable to summary judgments as heretofore articulated by this Court, and if *certiorari* is not granted by this Court, this young man who received catastrophic injuries will lose his right to his day in court and the opportunity to prove his case as he is entitled to do under the United States Constitution and under the prior decisions of this Court. The action of the court below flies in the teeth of and violates the rules applicable to summary judgments as heretofore pronounced by this Court.

The court below, by not deciding this case in accordance with the applicable decisions of this Court, has violated Rule 19A of the Supreme Court Rules. Further, it has violated Rule 19B in that it has decided the Federal question in a way which is in conflict with applicable decisions of this Court as hereinabove set forth. Finally, the court below, in violation of Rule 19B, has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision and review. Quite obviously, if this Court did not have the power to review the action of trial courts in granting motions for summary judgments in actions involving disputes between private citizens, then such trial courts could willy-nilly grant motions for summary judgment based on its interpretation of the facts and with the thought that by so doing, they could eliminate cases and clean up the well-known clogged calendars that exist in the Federal District Courts. While it is certainly desirable to speed up litigation and to clear court calendars whenever possible, such an objective should not be achieved at the expense of litigants who have a right to be heard and who have a constitutional right to have their cases tried by juries on the merits. Unfortunately, that result is precisely what took place in the instant case.

II

THERE ARE GENUINE, MATERIAL ISSUES OF FACT WHICH WARRANT A JURY TRIAL AND RESPONDENTS, IN THEIR BRIEF, HAVE IN NO WAY DEMONSTRATED THAT THIS IS NOT CORRECT

With reference to the merits of petitioner's position that he is entitled to his day in court, we would like to make the following comments and observations:

1. In our opening brief we set forth the numerous genuine material issues of fact which exist and the evidence which supports same. Respondents, in their brief, follow the same procedure that they did in the trial court, namely to simply ignore the evidence which is in petitioner's favor and only argue the evidence which supports their view as if said contrary evidence was non-existent. We submit that such conduct and procedure is highly improper and that if this Court looks at the evidence supporting plaintiff's views with reference to the liability of each defendant, it will readily perceive that there are contested issues of fact which should be tried as to each defendant.

2. In our opening brief, we pointed out at pages 6 and 8 evidence from which a jury could well conclude, (1) that DAVID WILLIAM QUEDENS did not know about the small wires that transversed the street in question in an unusual place, (2) that DAVID was in no way bent on an act of self-destruction, and (3) that DAVID, either because of the sun exposure or otherwise, was clearly oblivious to the fact that he was in the vicinity of the high, deadly, and uninsulated small wires in question. The trial court opinion that DAVID was bent on an act of self-destruction and/or

suicide simply cannot stand as a matter of law because there is substantial evidence to the contrary. If DAVID was not bent on an act of self-destruction and/or suicide as found by the trial court, then the summary judgment must fall because if DAVID knew nothing about the wires, or even if he had been told about them some two weeks before, then we still have the right to have a jury determine all of the numerous defenses that exist to the doctrine of contributory or comparative negligence and which are discussed in our opening brief, such as momentary forgetfulness, distraction, absorption in one's work, attention to one's work, the right to expect safety, the applicability of § 302 of the Restatement of Torts, etc. None of these latter issues can properly be decided as a matter of law. They are questions of fact. The conduct and reasonableness of DAVID QUEDENS actions were questions of fact for the jury to determine under all of the circumstances applicable to this case. Respondents, in their reply brief, answer this point by simply ignoring it. They do not discuss the evidence supporting petitioner's view of the evidence and in no way argue that, if believed, it would not be sufficient to support the conclusions urged by petitioner.

3. PACIFIC POWER, in its brief, in essence, argues that the case of *Probart v. Idaho Power Co.*, (1953) 258 P. 2d 361, entitled the power company to a verdict as a matter of law and that based upon *Probart* the Court was required to grant summary judgment. We submit that this assertion is preposterous. Any fair reading of the cases cited by petitioner in his opening petition at pages 9 through 13 will disclose that once a power company has knowledge of the fact that workmen or others are operating in the vicinity of

its *uninsulated* high-voltage lines, that the power company then has a positive, *affirmative,* duty to take immediate steps and actions to do whatever is necessary to prevent injury from occurring. In our opening brief, we set forth many different types of action that a power company can take under such circumstances. We point out, in our opening brief, that under the uncontradicted facts in this case, the defendant power company had *actual* knowledge of the changed circumstances that existed in the vicinity of these unusually placed, high, small, little wires, and yet didn't take one step, as it was required to do, to prevent injury. The said *Probart* case simply is not applicable to the facts of this case nor to the general law on the subject matter because in the *Probart case,* there is absolutely no evidence that the power company had any knowledge whatsoever of the fact that there were changed circumstances or that work was going on in the area. The Court in *Probart* stresses this point and in no way states or indicates that the general rule of liability would not be applicable in Idaho, and that where there is knowledge, the power company does not have a positive, *affirmative* duty to take immediate steps to prevent injury. Respondent, power company, simply ignores this point and states as a fact that the facts in *Probart* are the same as in our case and that therefore *Probart* is applicable. Nothing could be further from the truth. Said respondent simply fails to discuss and/or meet or even talk about the point of law in question.

4. All three respondents, in their briefs, state as a matter of fact, that James G. Maria, in a sworn affidavit done at a time when he was not subject to cross-examination, specifically pointed out the three little "tap" line wires that crossed the street in the middle of the block and which were responsible for DAVID's injuries. These wires ran east and west generally rather than north and south. The power company, in its brief at page 4, admits that there was a three-wire set which ran along the trees and parallel with the trees in a north-south direction. In other words, there were three sets of wires running along the street parallel with the trees and *then there were the tap line wires which ran across the middle of the block and which were the ones that injured DAVID.* The conclusion reached by respondents and which they have continuously attempted to foist on both the trial court, the Court of Appeals, and now this Court that the wires pointed out by Maria were the tap wires simply is not warranted by any reasonable and/or fair reading of his affidavit. His exact words are contained at pages 598 and 599 of his affidavit and are as follows:

> "When we viewed the premises, we discussed the type of trimming work which needed to be done. Some of the trees needed to be rounded over and given a symmetrical shape and other trees needed to have the dead limbs removed. During this discussion, I called David's attention to the location of the power lines near the trees which were to be trimmed and instructed him to be careful and not to get the bucket or any part of the boom any closer than six feet to the power lines."

Certainly one could reasonably conclude, that since Maria was specifically pointing out the trees that needed to be trimmed, that the wires which he pointed out were the three which ran along the street and parallel with the

trees. He does not state that he specifically called the unusually placed three tap wires to DAVID's attention. In fact, he does not even state where he was standing when he pointed out said wires. For ought that appears, he could have been up the block, down the block, or even around the corner. Since all inferences in a motion for summary judgment are to be made in favor of the party opposing the motion, the court should not have determined as a matter of law that the wires which Maria was talking about were the three "tap" wires rather than the ones which ran parallel with the street. There is thus no evidence in the record which shows as a matter of law that Maria, or anyone else, ever pointed out the three "tap" wires to DAVID. The statement of respondents to said effect is simply unwarranted and unsupported by the evidence. Finally, we would point out that this man who was a former employee of Davey Tree Company was obviously approached unilaterally by someone on behalf of the respondents and that his testimony has never been subjected to the crucible of cross-examination. Further, we would point out that even, assuming arguendo, that he had pointed out these little wires some two weeks before the time of the accident, DAVID would still have the right to have the jury determine whether or not the defendants nevertheless were negligent for not taking steps to make the area safe, by either insulating the wires, turning them off, marking them, lowering them, or taking any one of the numerous other steps suggested by the cases cited by us in our opening petition, and further, whether or not DAVID might be absolved by the doctrines of momentary forgetfulness, etc., herein-above cited. As set forth in our

opening petition, Idaho follows the doctrine of comparative negligence and accordingly, even if the jury found that DAVID was negligent in some degree, assuming arguendo that he had in fact been told about the wires and thereafter forgot about them, it would still be a question for the jury to determine the respective percentages of fault of the respondents and of DAVID. The jury was deprived of this opportunity by the action of the trial court in this case in granting summary judgment.

5. Respondent, MOBILE AERIAL TOWERS, INC., simply ignores and fails to discuss both the case law and the Idaho statute set forth by us in our opening petition which clearly indicate that both under Idaho case law and under the Idaho statute, a manufacturer who places his merchandise in the stream of commerce, is subject to jurisdiction in whatever state the product goes into, if injury occurs in that state. Said defendant cannot and has not cited any Idaho case or other case or statute which precludes jurisdiction. We submit that as indicated by us in our opening petition the overwhelming trend of authorities under modern-day products liability law, is to hold the manufacturer of a product subject to jurisdiction in whatever state the product causes injury, once the product is placed into the stream of commerce with knowledge that it may go into that state.

6. Respondent, MOBILE, does not address itself, in its responding brief, to the fact that the trial court based its decision with reference to the latent vs. patent dichotomy on the infamous *Campo v. Schofield* case (1950) 301 N.Y.

468, 95 N.E.2d 802 *and its progeny* and that said case has been overruled by the court which established it and that it no longer represents the modern trend in this country. Please see our opening petition for discussion of the authorities which now clearly hold that the right to recover in a products liability design case no longer depends on such a distinction.

7. The IDAHO NATIONAL BANK cites no cases whatsoever to support its contention that §§ 416 and 427 of the Restatement 2d. of Torts applies only where the defendant employer actually owns the property where the work is being performed. Any fair reading of said sections would indicate that the applicability of said sections does not depend upon the employer owning the underlying real property. Quite obviously, the sections are designed to require the employer to take steps to provide protection for workmen where there are special or unusual risks of harm in the work area.

In the instant case, as pointed out in our opening petition, the BANK knew of these special and/or unusual risks of harm before the date of this accident, knew that the work was taking place, and yet did not take *any steps whatsoever* to provide any safety and/or protection. Accordingly, we submit that the BANK is liable as a matter of law for the injuries sustained by DAVID QUEDENS. While the evidence is uncontradicted that the BANK knew about these wires, there is no evidence, contrary to the assertions of the respondents, that DAVID knew about the

wires, unless one interprets the above-mentioned Maria declaration to mean that Maria was referring to the three "tap" wires which caused the injury. Under the familiar rules applicable to motions for summary judgment, we do not believe that such an interpretation is possible. In short, one of the glaring failures in all three respondents' briefs is the lack of recitation of any evidence which would support any such conclusion.

CONCLUSION

In conclusion, we submit that there is ample authority to support both the power, the duty, and the right of this Court to grant *certiorari* in a case where the U.S. District trial courts have ignored and disregarded the familiar rules applicable to motions for summary judgment. Second, we submit that if one looks at the merits of the motions for summary judgment, it is quite obvious that there is ample evidence to support findings of fact quite contrary to those arrived at by the trial court on the issues of whether DAVID WILLIAM QUEDENS was bent on an act of self-destruction, whether he knew about the wires in question, whether or not, even assuming arguendo that he knew about the wires, his conduct was excused by any of the familiar rules applicable to such situations, and further as to the duties of the three defendants to provide such protection as would have prevented the injury under the circumstances of this case. We sincerely submit that if there

was ever a case where this Court should grant a reversal following the granting of a summary judgment, that this is it.

Dated: September 12, 1979.

Respectfully submitted,

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